Supreme Court, U. S.
FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

80-1105

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

No. _____

LOUIS E. WOLFSON,

Petitioner-Appellant,

—VS—

JOHN D. BAKER, JR., etc., et al.,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM H. MANESS, *Esquire*
502 Florida Theatre Building
Jacksonville, Florida 32202
(904) 353-5786
Attorney For Petitioner

Of Counsel:
ROY COHN, *Esquire*
39 East 68th Street
New York, New York 10021
(212) 472-1400

Question Presented

Where it affirmatively appears that the Court of Appeals, in affirming the District Court Judgment, relied upon a finding "*** that the record on its face does not disclose the lack of a full and fair opportunity for Wolfson to litigate the knowledge issue, and *** that Wolfson has an opportunity to collaterally attack his conviction in a *coram nobis* proceeding in New York", **and that a different result would have been reached by the District Court and the Court of Appeal had the** *coram nobis* **proceeding succeeded,** and, further, **that the** *coram nobis* **proceeding has not ended** but is pending before this Court on Wolfson's Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, will this Court take jurisdiction to review the opinion of the Court of Appeals pending disposition by this Court of said Petition?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Appendix iii

Table of Authorities iv

Petition 1

Opinions Below 2

Grounds On Which Jurisdiction is Invoked 2

Constitutional Provisions 2

Statement of the Case 3

Argument 8

Conclusion 9

APPENDIX

Page

Opinion of the District Court 1a
444 F. Supp. 1124

Opinion of the Court of Appeals 34a
623 Fed. 2d 1074

TABLE OF AUTHORITIES

Page

U. S. Constitution —
Amendment 5 2

Statute —
28 U.S.C. §1254 2

Rules —
Supreme Court Rule 17.1(a) 2
Fed. R. Civ. Proc. 12(b) 6 5

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

LOUIS E. WOLFSON,

Petitioner-Appellant,

—VS—

JOHN D. BAKER, JR., etc., et al.,[1]

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

[1] John D. Baker, Jr., Robert M. Gardiner, John A. Murphy, Clifford Roberts, Frank A. Willard, J. Dabney Penick, John C. White, Robert G. Howard, Ralph E. Carpenter, Jr., James L. Murphy, Robert E. Palmer, Kenneth F. Mountcastle, Jr., John L. Moore, Alpheus C. Beane, Paul B. Hanrahan, Joseph H. Brown, John F. Bryan, William A. Devlin, Arthur W. Geggie, Jr., David A. Harrison, III, W. Carroll Mead, Norwood Norfleet, James W. Cunningham, Henry H. Fahrig, Jr., Glen E. Givens, William E. Hollan, Charles J. Kershaw, Charles A. Wiegard, Arthur J. Bach, Howard B. Dean, Harter W. Haynes, Hugh C. Brewer, Vernon H. Brown, John E. Carney, Robert Proddow, Jr., William H. Williamson, III, Houston A. Cox, Jr., Anthony M. Englese, Ieon Philip Swirbul, T. Downs Mallory, Arthur F. Schlobohm, Jr., Irwin H. Menchel, Donald B. Sherwood, John B. Nutt, Melvin O. Wright, Robert D. Gray, Bernard E. Teichgraeber, Glenn T. Allen, Jr., James E. Biby, Frank J. Campbell, III, Charles R. Caruana, Ernest E. Christensen, Frank A. Connolly, Jr., Joseph V. Maloney, Alfred F. Revson, Jr., John B. Ellis, Hugh McKee, Jay L. Levine, David L. Godvin, Donald R. Marvin, Robert H. Stovall, Thomas F. Staley, Shirley H. Staley, Thomas F. Staley, Jr., Janet S. Howard, William J. B. Smith, Mary Harrison, C. Alan Hudson, Estate of Theodore Weicker, Jr., Katherine B.

Opinions Below

The opinion of the District Court is reported in 444 F. Supp. 1124, copy of which is found on page 1a of the Appendix hereto.

The opinion of the Court of Appeals is reported in 623 F.2d 1074, copy of which is found on page 34a of the Appendix hereto.

Grounds On Which Jurisdiction Is Invoked

The Judgment sought to be reviewed was dated and entered on August 14, 1980.

A timely Petition for Rehearing was denied on October 6, 1980.

The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question by Writ of Certiorari is 28 USC §1254 and Rule 17.1(a) of the Rules of this Court effective June 30, 1980.

Constitutional Provisions

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

---

Mountcastle and Eugene Henry Lear, co-partners trading and doing business as Reynolds & Co., a New York partnership; and The Barnett Bank of Jacksonville, N.A. and Mrs. Edith A. Morley, as Executors of the Will of John J. Morley, Deceased.

without due process of law; nor shall private property be taken for public use, without just compensation.

Statement Of The Case

Petitioner-Appellant (hereafter "Wolfson") sued the Defendants in the U. S. District Court, invoking the jurisdiction of that Court by stating a private, implied right-of-action arising under the Securities Exchange Act of 1934 and certain rules and regulations of the Securities and Exchange Commission.

Essentially, the two real Defendants in this case are (1) Reynolds & Company (hereinafter "Reynolds"), a New York partnership which engages in the securities brokerage business, and (2) the Estate of John Morley, who prior to his death acted as Wolfson's stockbroker for a number of years. Primarily, it was the actions of John Morley which underlie all of Wolfson's claims.

The District Court summary of the basis of Wolfson's Complaint is accurately and concisely stated as follows, to-wit: (Appendix-38a)

> Count I of the third amended complaint purports to state a private, implied right-of-action arising under the Securities Exchange Act of 1934 and certain rules and regulations of the Securities and Exchange Commission (hereinafter "SEC"). This count alleges in pertinent part that (1) beginning in 1943, John Morley acted as the stockbroker for the plaintiff Wolfson and his business associates; (2) that prior to June 1963 Morley was employed by the brokerage firm of A. M. Kidder & Company (hereinafter "Kidder"); (3) that after June of 1963 Morley was employed by the defendant Reynolds; (4) that at all times during their broker/customer relationship Morley (and, vicariously, the defendant Reynolds) owed the plaintiff a duty of care

by virtue of (a) a series of signed agreements known as "broker/customer" agreements, setting forth certain terms and conditions of the relationship, and (b) Rule 405 of the New York Stock Exchange, the terms of which are set forth hereinafter; (5) that in connection with certain sales by the plaintiff of his capital stock in [Continental], the duty of care enumerated in item (4) *supra* was "recklessly disregard[ed]"; (6) that as a proximate result of (5) the plaintiff was indicted and convicted in the United State District Court for the Southern District of New York on September 29, 1967, for violating section 5 of the Securities Act of 1933 [15 U.S.C. § 77e (1970)]; (7) that as a further proximate result of (5) the plaintiff has been joined as a party defendant in four civil suits brought in Kentucky and New York by shareholders of Continental claiming damages in excess of two million dollars; and (8) that the plaintiff has, as a result of his criminal conviction, sustained certain specified damages. Count I admits that prior to June of 1963 the defendant Morley was employed not by the defendant Reynolds but by Kidder, but this count also alleges that Reynolds succeeded to the liabilities of Kidder when it acquired certain of Kidder's assets in 1963.

Count II also purports to state an implied private claim under the Securities Exchange Act of 1934. It realleges much of Count I verbatim, but by its terms is limited to the transactions in Continental stock occurring after June of 1963 — the date when Reynolds bought out Kidder's Jacksonville office and employed John Morley — and seeks to recover for those transactions in Continental stock for which Reynolds is liable as the direct employer of Morley, i.e., independent from whatever liabilities Reynolds might have succeeded to when it acquired Kidder's Jacksonville assets.

> Count III purports to state claims under both federal and state law, invoking the Court's pendent jurisdiction as to the latter claims. It alleges that while acting on behalf of Kidder and the defendant Reynolds, the defendant Morley willfully and fraudulently misrepresented to the plaintiff that he could engage in the purchase and sale of stock in Continental and three other corporations without running afoul of the prohibitions of any federal or state securities laws. Count III further alleges that the defendants' fraudulent misrepresentations proximately resulted in the criminal conviction and civil litigation previously recounted, and the damages incurred thereby.
>
> Count IV alleges that, under state law, Wolfson is entitled to recover punitive damages for the transgressions alleged in the preceding three counts. This count is wholly dependent upon the Court's exercise of its pendent jurisdiction, since no claim is asserted under federal law. (Appendix-40a)

The District Court denied recovery to Wolfson on all four Counts, granting Summary Judgment with respect to Counts I and II, and dismissing Counts III and IV with prejudice under Rule 12(b) (6) Fed. R. Civ. Proc.

The underlying basis on which recovery was denied in the District Court, and the basis on which the Court of Appeals affirmed the District Court, was the application of the doctrine of nonmutual collateral estoppel so as to prevent Wolfson from denying "that at the time of the stock transactions alleged in the indictment upon which he was tried and convicted, he knew that the securities laws required that he file a registration statement for engaging in those transactions."

However, the Court of Appeals agreed with Wolfson on this crucial point, to-wit:

Wolfson correctly contends that a party against whom an adverse determination has been made on an issue in a prior action will not invariably be prevented from relitigating that issue. The Supreme Court and this Court have held that nonmutual collateral estoppel will be applied only where there was a "full and fair" opportunity in the first action to litigate the issue for which collateral estoppel is sought, *Parklane Hosiery*, 439 U.S. at 326–33, 99 S.Ct. at 648–52; *Blonder-Tongue*, 402 U.S. at 332–33, 91 S.Ct. at 1444–45; *Johnson v. United States*, 576 F.2d 606, 614–15 (5th Cir. 1978); *Rachal v. Hill*, 435 F.2d at 62. In addition, we have said that nonmutual collateral estoppel will not be invoked "[if] some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case." *Rachal v. Hill*, 435 F.2d at 63, quoting *Bruszewski v. United States*, 181 F.2d 419, 421 (3rd Cir.), *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950). *See also Johnson v. United States*, 576 F.2d at 614.

It is beyond dispute that Wolfson had a full and fair opportunity to litigate the issue whether he knew of the registration requirement for his sale of Continental stock in the sense that he was motivated by the serious criminal charges to "litigate and to litigate to the finish," *Blonder-Tongue*, 402 U.S. at 332, 91 S.Ct. at 1444, and that the full array of procedural protection was available to him there. Instead, he argues that he was denied a full and fair opportuity to litigate the issue of his knowledge and that application of collateral estoppel would result in an injustice because, at the criminal trial, the prosecution allegedly withheld certain material exculpatory evidence from him and because the prosecution's key witness against him, John Morley, allegedly committed perjury as part of a conspiracy

> between Morley and other brokers, the object of which was to convict Wolfson and to escape criminal and civil liability for themselves. Even if we assume that Wolfson's allegations of perjury and withholding of exculpatory evidence are true, we do not think that they are sufficient to defeat the invocation of collateral estoppel in this case. In view of the fact that the record on its face does not disclose the lack of a full and fair opportunity for Wolfson to litigate the knowledge issue, and the fact that Wolfson has an opportunity to collaterally attack his conviction in a coram nobis proceeding in New York, where his criminal trial was held, we fail to discern any injustice in refusing to allow relitigation of the knowledge issue here.

As pointed out in footnotes 6 and 7 of the Opinion of the Court of Appeals (Appendix page 49a) Wolfson has served his sentence, the *coram nobis* proceedings were appropriate, Wolfson's first Petition had been denied by Judge Palmieri who presided over the criminal trial, that denial had been affirmed by the Second Circuit and Wolfson had filed a second *coram nobis* petition which was denied by Judge Gagliardi of the Southern District of New York and Wolfson's appeal from that denial was pending before the Second Circuit while this case was pending before the Fifth Circuit.

However, as will more fully appear from the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed in this Court December 17, 1980, No. 80–998, the Second Circuit affirmed the Opinion of Judge Gagliardi and the jurisdiction of this Court has been sought on this fundamental question, to-wit:

> "Whether the Court of Appeals, by affirming the denial by the District Court, without an evidentiary hearing or oral argument, of a petition for a writ of error *coram nobis*, has deprived petitioner of his Fifth

> Amendment rights under the holding in *Brady v. Maryland*, 373 U.S. 83 (1963), and sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings, so egregious as to mandate the exercise of this Court's power of supervision."

Thus, the basic assumption of the District Court and the Court of Appeals, to-wit: that Wolfson had a full and fair opportunity to litigate the knowledge issue, cannot be answered with certainty until the *coram nobis* proceedings have been concluded by the action of this Court on the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ARGUMENT

Jurisdictionally speaking, if the Petition for Writ of Certiorari to the Second Circuit is granted, and Wolfson's right to an evidentiary hearing on his Petition for Writ of Error Coram Nobis is mandated, then and only then can it be said that Wolfson has had "a full and fair opportunity" to litigate the knowledge issue.

On the other hand, if the Petition for Writ of Certiorari to the Second Circuit is denied, then and only then can it be said that Wolfson had any meaningful opportunity to collaterally attack his conviction in a *coram nobis* proceeding where his criminal trial was held.

The inter-relatedness of this Petition, and the jurisdictional grounds therefor, are inseparable from the Petition for Writ of Certiorari to the Second Circuit now pending before this Court and this Court should, in the exercise of this Court's power of supervision accept and retain jurisdiction of this cause pending disposition of the Petition for Writ of Certiorari to the Second Circuit.

CONCLUSION

The Court of Appeals, by affirming the District Court, has deprived Wolfson of due process of law and sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings by indulging the assumption that the criminal trial proceedings afforded Wolfson "a full and fair opportunity" to litigate the knowledge issue in the trial itself or the subsequent *coram nobis* proceedings which have not yet been completed.

The Court should accept and retain jurisdiction of this cause pending disposition of the Petition for Writ of Certiorari to the Second Circuit.

Respectfully submitted,

WILLIAM H. MANESS, *Esquire*
502 Florida Theatre Building
Jacksonville, Florida 32202
(904) 353-5786
Attorney for Petitioner-Appellant

Of Counsel:

ROY COHN, *Esquire*
39 East 68th Street
New York, New York 10021
(212) 472-1400

APPENDIX

APPENDIX

Opinion of the District Court

LOUIS E. WOLFSON,

Plaintiff,

v.

JOHN D. BAKER, JR., et al.,

Defendants.

No. 70-1036-Civ-J-T.

United States District Court,
M. D. Florida,
Jacksonville Division.

Jan. 20, 1978.

[444 F. Supp. 1124]

Investor sued stockbroker and others to recover under federal securities law and state common law of misrepresentation for alleged failure to inform investor that his corporate stockholdings were substantial enough to require filing of a registration statement as a condition precedent to sale of large quantities of the stock in a short period. Defendants moved to dismiss or, alternatively, for summary judgment. The District Court, Melton J., held that: (1) where issue of investor's knowledge of registration requirements was exhaustively litigated in criminal proceedings resulting in his conviction of violating registration requirement, investor was collaterally estopped in his proceeding from asserting lack of knowledge of the registration requirement; (2) a reckless disregard of the duty imposed by New York Stock Exchange Rule 405, the "Know Your Customer" rule, is sufficient to sustain a private right of action; (3) investor's knowledge of

registration requirements precluded recovery under the rule, and (4) since litigation was still in its early stages and state claim was of somewhat dubious merit and diversity of citizenship did not even arguably exist, the pendent state law claim would be dismissed.

Judgment for defendant.

1. Judgment 720

Doctrine of collateral estoppel can operate only as to those facts which have been actually litigated and necessarily determined in a prior proceeding.

2. Judgment 648

Subject to certain limitations, a party convicted in a criminal proceeding may be estopped, in a subsequent civil proceeding, to relitigate those questions distinctly put in issue and directly determined in the criminal prosecution.

3. Judgment 634, 666

In applying the collateral estoppel doctrine, the more technical aspects of the mutuality and privity restrictions have been relaxed in favor of a more pragmatic approach and, hence, regardless of mutuality principles, collateral estoppel may be invoked where it appears that the party against whom it is asserted had a full and fair opportunity to litigate the issue in the prior proceeding, be it civil or criminal, and that application of the doctrine will not result in an injustice.

4. Judgment 648

Where issue whether investor knew that registration statement was required in connection with sales of large quantities of stock in a short period was exhaustively litigated in proceedings resulting in his criminal conviction of

violating the securities laws by failing to file such statement, the investor was collaterally estopped, in subsequent private civil suit charging stockbrokers with breaching stock exchange rule by failing to advise him of the registration requirement, from claiming lack of knowledge of such requirement. Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A. § 78a et seq.; Securities Act of 1933, § 5, 15 U.S.C.A. § 77e.

5. Federal Courts 207

To extent that broker/customer agreement underlay garden-variety breach of contract action by investor against stockbroker, the investor could not invoke federal question jurisdiction since, standing alone, contract between a broker and his customer usually involves only matters of state law. Securities Exchange Act of 1934, § 29, 15 U.S.C.A. § 78cc.

6. Federal Courts 207

Access to federal courts for vindication of private rights under the securities laws is far from unlimited; as a threshold matter, federal courts are to examine individual claims in light of the policies to be served by the securities laws and if it is found that the particular plaintiffs assert a claim consistent with furtherance of federal policy in the securities field, the courts are not reluctant to imply private causes of action for purpose of federal question jurisdiction. Securities Exchange Act of 1934, §§ 10(b), 27, 15 U.S.C.A. § 78j(b), 78aa.

7. Securities Regulation 121

Private, federal causes of action under the securities laws can be grounded on an alleged breach of stock exchange rules. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

8. Securities Regulation 121

A reckless disregard of duty imposed by New York Stock Exchange Rule 405, the so-called "Know Your Customer" rule, is sufficient to sustain a private cause of action under the securities laws for a breach of that rule. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

9. Securities Regulation 121

Since investor was estopped from denying that he knew of registration requirement in connection with sales of large blocks of corporate stock he could not be heard to complain that his brokers recklessly failed to learn of and advise him of the registration requirement, in violation of New York Stock Exchange Rule 405, i.e., the "Know Your Customer" rule; in any event, brokers had a meritorious in pari delicto defense to such claim. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. §78aa.

10. Action 3

Critical factor in determining whether to employ a private right of action for breach of a federal law which does not specifically provide for a private cause of action is whether plaintiff is a member of the class which the law was designed to protect.

11. Exchanges 4

New York Stock Exchange Rule 405, which imposes on securities brokers broad obligations to learn the essential facts with respect to every customer and every order, was promulgated primarily for protection of the innocent investor. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

12. Securities Regulation 121

Investor's knowledge of illegality of his sales of large blocks of stock without filing registration statement barred his recovery against defendant brokers, who executed the sales and whose alleged violation of stock exchange rule in failing to inform him of the registration requirements resulted in his indictment and conviction under the securities laws as well as his joinder as a party defendant in shareholders' derivative actions. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

13. Securities Regulation 121

Actual injury is a necessary element to private causes of action based on alleged violations of stock exchange rules. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

14. Fraud 25, 47

Under Florida law, actual injury is a necessary element of tort and fraudulent misrepresentation; hence, absent any allegation of damages investor had no right of action against stockbrokers because of their alleged representations that he could sell a large block of stock without filing registration statement.

15. Federal Courts 409

As to state law matters, a federal district court applies the choice of law rules which govern actions brought in the state courts of the forum state.

16. Torts 2

In tort actions, Florida courts apply the traditional choice of law rule lex loci delicti, determining the substantive issues in a case by looking to the law of the state where the tort occurred.

17. Federal Courts 18

Where federal claims are dismissed before trial, dismissal of pendent state claims is discretionary rather than mandatory.

18. Federal Courts 18

On finding that investor could not prevail on Securities Exchange Act claim based on violation of stock exchange rules, district court dismissed pendent state law claim sounding in fraudulent misrepresentation where litigation was still in its early stages, discovery had been strictly limited to items of threshold importance and to retain pendent jurisdiction would place court in position of trying a state claim of somewhat dubious merit where diversity of citizenship does not even arguably exist and crowded docket conditions counselled against such course. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

William H. Maness, Jacksonville, Fla., Roy Cohn, Saxe, Bacon, P. A., New York City, for plaintiff.

Thomas M. Baumer, Mahoney, Hadlow & Adams, Jacksonville, Fla., for defendants.

OPINION

MELTON, District Judge.

This is a case which began on December 17, 1970, with the filing of a one-court complaint purporting to state an implied, private claim under the federal securities laws. To date, no answer has been filed on behalf of the defendants. Instead, the defendants have moved several times to dismiss the complaint, to obtain a more definite statement of the plaintiff's allegations, or for summary judgment on the merits. As a result, the cause is presently before the Court

on the plaintiff's third amended complaint, filed on February 14, 1975, and the defendants' responsive motion to dismiss or, in the alternative, for summary judgment. By prior order of this Court, discovery to date has been limited to matters germane to these threshold proceedings. For the reasons set forth below, this Court has concluded that the defendants' motion is well taken, and accordingly the Court will grant their motion—in some respects through a dismissal with prejudice, and in other respects through a summary judgment on the merits.

PLAINTIFF'S ALLEGATIONS

The plaintiff's third amended complaint sets forth four counts. Although it alleges a plethora of named defendants, there are only two real defendants in this case: (1) Reynolds & Company (hereinafter "Reynolds"), a New York partnership which engages in the securities brokerage business, and (2) the estate of John Morley, who prior to his death acted as the plaintiff's stockbroker for a number of years.[1] Essentially, it is the actions of John Morley which underlie all of the plaintiff's claims.

Count I of the third amended complaint purports to state a private, implied right-of-action arising under the Securities Exchange Act of 1934 and certain rules and regulations of the Securities and Exchange Commission (hereinafter "SEC"). This count alleges in pertinent part that (1) beginning in 1943, John Morley acted as the stockbroker for the plaintiff Wolfson and his business associates; (2) that prior to June 1963 Morley was employed by the brokerage firm of A. M. Kidder & Company (hereinafter "Kidder"); (3) that

[1] When the first complaint in this case was filed, Morley was still alive and was named as a defendant. Morley died during the pendency of these proceedings, and his estate was substituted as a party by an order of this Court entered on August 28, 1973.

after June of 1963 Morley was employed by the defendant Reynolds; (4) that at all times during their broker/customer relationship Morley (and, vicariously, the defendant Reynolds) owed the plaintiff a duty of care by virtue of (a) a series of signed agreements known as "broker/customer" agreements, setting forth certain terms and conditions of the relationship, and (b) Rule 405 of the New York Stock Exchange, the terms of which are fully set forth hereinafter; (5) that in connection with certain sales by the plaintiff of his capital stock in Continental Enterprises, Inc. (hereinafter "Continental"), the duty of care enumerated in item (4) *supra* was "recklessly disregard[ed]"; (6) that as a proximate result of (5) the plaintiff was indicted and convicted in the United States District Court for the Southern District of New York on September 29, 1967, for violating section 5 of the Securities Act of 1933 [15 U.S.C. § 77e (1970)]; (7) that as a further proximate result of (5) the plaintiff has been joined as a party defendant in four civil suits brought in Kentucky and New York by shareholders of Continental claiming damages in excess of two milion dollars; and (8) that the plaintiff has, as a result of his criminal conviction, sustained certain specified damges. Count I admits that prior to June of 1963 the defendant Morley was employed not by the defendant Reynolds but by Kidder, but this count also alleges that Reynolds succeeded to the liabilities of Kidder when it acquired certain of Kidder's assets in 1963.

Count II also purports to state an implied private claim under the Securities Exchange Act of 1934. It realleges much of Count I verbatim, but by its terms is limited to the transactions in Continental stock occurring after June of 1963—the date when Reynolds bought out Kidder's Jacksonville office and employed John Morley—and seeks to recover for those transactions in continental stock for which

Reynolds is liable as the direct employer of Morley, *i.e.*, independent from whatever liabilities Reynolds might have succeeded to when it acquired Kidder's Jacksonville assets.

Count III purports to state claims under both federal and state law, invoking the Court's pendent jurisdiction as to the latter claims. It alleges that while acting on behalf of Kidder and the defendant Reynolds, the defendant Morley willfully and fraudulently misrepresented to the plaintiff that he could engage in the purchase and sale of stock in Continental and three other corporations without running afoul of the prohibitions of any federal or state securities laws. Count III further alleges that the defendants' fraudulent misrepresentations proximately resulted in the criminal conviction and civil litigation previously recounted, and the damages incurred thereby.

Count IV alleges that, under state law, Wolfson is entitled to recover punitive damages for the transgressions alleged in the preceding three counts. This count is wholly dependent upon the Court's exercise of its pendent jurisdiction, since no claim is asserted under federal law.

From the foregoing, it should be apparent that the plaintiff relies heavily upon his criminal trial and conviction to support his cause of action. The criminal conviction comprises the cornerstone of his claim for damages; the only injuries alleged, aside from that conviction, are those incurred in defending the four civil suits instituted by Continental shareholders. In the Court's view, Wolfson's criminal trial and conviction *are* of critical importance here, not only as an essential element (i.e., actual injury) of Wolfson's cause of action, but also because the prior trial conclusively establishes certain facts for the purposes of this case through the operation of the collateral estoppel doctrine. In

fact, the Court's analysis of this case hinges upon collateral estoppel principles, and the effects of those principles on the merits of this case.

COLLATERAL ESTOPPEL

[1] In analyzing the possible collateral estoppel effects of Wolfson's 1967 criminal conviction, it has been necessary for the Court to review the record of that case in some detail. It is, of course, a fundamental precept of the collateral estoppel doctrine that that doctrine can operate only as to those facts which have been actually litigated and necessarily determined in a prior proceeding. *See generally* 1B J. Moore, Federal Practice § 0.441 (2d ed. 1974). For summary judgment purposes, the defendants have offered as an exhibit a certified copy of the record of Wolfson's criminal case, and the Court has examined this exhibit closely. Upon reflection, the Court is convinced that, by operation of the collateral estoppel doctrine, at least one crucial fact is conclusively established for the purposes of this case: the plaintiff Wolfson is estopped to deny that, at the time of the stock transactions alleged in the indictment upon which he was tried and convicted, he knew that the securities laws required that he file a registration statement before engaging in those transactions.

The Court will hereinafter examine the implications of this fact in the context of the instant case. Preliminarily, however, the Court should detail the reasons underlying its conclusion that collateral estoppel precludes Wolfson from denying that he knew of the illegality of the transactions which led to his criminal conviction.

The indictment upon which Wolfson was tried and convicted contained nineteen counts. Count One alleged that Wolfson had conspired with various other persons to violate

sections 5 and 24 of the Securities Act of 1933, 15 U.S.C. §§ 77e and 77x (1970). Counts Two through Nineteen alleged substantive violations of the same statutes in connection with eighteen specified sales of large blocks of stock in Continental Enterprises, Inc., allegedly executed at Wolfson's direction between October 5, 1961, and January 9, 1962. Succinctly stated, the gravamen of the government's case was that Wolfson's (and his close associates') holdings in Continental stock[2] were substantial enough to require the filing of a registration statement with the SEC as a condition precedent to Wolfson's sale of his Continental stock in such large quantities during such a short period of time. It was undisputed that the sales of stock in question were not accompanied by any registration statement. As a predicate for Wolfson's criminal liability, the terms of 15 U.S.C. § 77x (1970) required that the government prove—beyond a reasonable doubt, of course—that Wolfson's failure to file the requisite documents with the SEC was a willful act on Wolfson's part.

Much of the government's case against Wolfson rested on undisputed facts. No one denied that the alleged sales of Continental stock had been made. In fact, no one seriously challenged the government's assertion that the sales in question ran afoul of the securities laws due to the lack of an accompanying registration with the SEC. Wolfson's defense focused almost entirely upon the willfulness element of the crimes alleged—briefly put, Wolfson claimed ignorance. He maintained that while, perhaps, technical violations of the law had occurred, he had had no knowledge of any illegality in connection with the Continental stock sales.

---

[2] At Wolfson's trial, the government adduced evidence (which was undisputed) that Wolfson and his associates—sometimes referred to as the "Wolfson group"—owned or controlled about 40% of the Continental stock then outstanding. The remainder of Continental was owned by about 5,000 members of the public.

The issue of whether Wolfson actually knew that his sales of Continental stock were legally deficient was, by far, the most hotly contested issue at Wolfson's trial. During its case-in-chief, the government called a number of securities brokers through whom Wolfson (or one of his associates) had sold various blocks of Continental stock. In the case of most of these brokers, Wolfson's sell orders had been relatively small. Defense counsel cross-examined each broker thoroughly on the subject of whether he had discussed the registration question with Wolfson or one of his subordinates, and none could recall having had any such discussions. With only one exception, the defense made no attack on the credibility of the brokers' testimony.

The one exception was the testimony of John Morley. During the time period alleged in the indictment, Morley had been a registered broker with the firm of A. M. Kidder & Company, a brokerage house with its principal offices in New York City. Morley was with Kidder's Jacksonville office, and had in fact been one of Wolfson's stockbrokers for a number of years prior to the allegedly illegal sales of Continental stock. It was with Morley that Wolfson placed the most substantial sell orders for his shares of Continental.

The defense strategy was to depict Morley as the one person who should have recognized the registration problems in the Continental transactions and should have informed Wolfson of these problems. In furtherance of this strategy, the defense position was that while Morley knew of or should have known of the applicable registration requirements, he neglected to call the requirements to Wolfson's attention for fear of aborting the transactions and losing the rather substantial commissions which Wolfson's Continental sales had generated.

After the government had rested its case, the defense continued it strategy of casting doubt upon whether Wolfson had known the illegal nature of what he was doing. In this connection, the crucial witness was Wolfson himself. After first calling several stockbrokers, an investment consultant, and a multitude of character witnesses,[3] Wolfson took the stand and flatly denied any knowledge of the legal shortcomings of his Continental sales. As an example of the tenor of Wolfson's testimony, the record discloses the following exchange between Wolfson and his defense counsel during direct examination:

> [DEFENSE COUNSEL:] You told Mr. Gerbert [Wolfson's close business associate and codefendant] to sell approximately 50,000 shares, is that right?
>
> [WOLFSON:] Whatever it was, yes, sir.
>
> Q: Did you tell him what brokerage firm to use?
> A: No, sir.
>
> Q: Did he ever report to you that he had any difficulty selling the stock?
> A: No, sir.
>
> Q: Did he ever mention to you any conversation that he had with Mr. Morley on the subject of selling this stock?
> A: No, sir.

---

[3] These "character" witnesses were called for the purpose of establishing Wolfson's reputation in the community for truthfulness. The witnesses were tendered under the rule of evidence now codified in Rule 608(a), Fed.R.Ev. A substantial number of witnesses was called for the sole purpose of establishing Wolfson's reputation for truth and veracity, and the list was impressive. It included many figures of national or local prominence, including sports figures Joe DiMaggio and Sid Luckman, television personality Ed Sullivan, and former Florida governor Fuller Warren.

Q: Did you ever hear one word about any problem connected with the sale of Continental Enterprises stock in 1954, 1955 or at any time up to 1960?

A: No, sir.

Q: Did Mr. Morley ever call you and raise any question?

A: No.

Q: Any broker ever call you and raise any question?

A: No.

Defendants' Exhibit B, vol. 13 at 1988-89. Although this colloquy pertains to stock sales prior to the period alleged in the indictment, Wolfson's claims of ignorance were no less vehement during his testimony regarding the actual sales for which he was on trial.

When the defense had rested, the government succeeded in introducing a damning piece of rebuttal evidence. The government produced an internal memorandum, dated in 1950, from the files of the SEC. The memorandum tended to indicate that at that time Wolfson had met with SEC officials and had discussed the federal registration requirements pertaining to a transaction substantially similar to Wolfson's Continental sales. The memorandum was introduced, of course, to show that Wolfson was well aware of the legal restrictions on his unregistered sale of the Continental stock.[4]

[4] Although the validity of the 1950 SEC memorandum was not forcefully challenged at Wolfson's criminal trial, the document was later the subject of considerable controversy. During the pendency of Wolfson's direct appeal from his criminal conviction, he alleged before the district court that the 1950 memorandum was spurious and moved for a new trial on that basis. The district court granted Wolfson an evidentiary hearing on his motion. This hearing lasted for six days and was comprised, for the most part, of expert testimony. After the hearing was concluded, the district court entered a written order finding the document to be authentic and denying Wolfson's motion for a new trial. *United States v. Wolfson*, 297 FSupp. 881 (S.D.N.Y. 1968). The district court's ruling was appealed to the Second Circuit and affirmed. *United States v. Wolfson*, 413 F2d 804 (2d Cir. 1969).

Not surprisingly, the closing arguments of counsel focused heavily on the issue of Wolfson's knowledge of the securities laws which he had allegedly violated. Defense counsel skillfully summarized the evidence in the case which tended to show Wolfson's ignorance, and in fact devoted the bulk of his argument to this very subject. Subsequent to the closing arguments, the trial court instructed the jury at some length, and included specific and comprehensive instructions on the knowledge/willfulness issue. Eventually, the jury returned a guilty verdict against Wolfson as to all nineteen counts of the indictment. Wolfson's conviction was later affirmed on direct appeal, *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), and the United States Supreme Court denied the ensuing petition for writ of certiorari. *Wolfson v. United States*, 394 U.S. 946, 89 S.Ct. 1275, 22 L.Ed.2d 479 (1969).

[2-4] From this Court's examination of the record in Wolfson's criminal case, it is abundantly clear that Wolfson's knowledge of the registration requirements in connection with his sale of Continental stock was an exhaustively litigated issue, and that the jury's verdict against Wolfson necessarily rests upon a finding that Wolfson's claims of ignorance were insufficient to create a reasonable doubt of his criminal culpability. What this Court must now determine is whether principles of collateral estoppel bind Wolfson to the position that he knew of the illegality of his Continental sales, and, if so, to what extent this fact bears on the merits of the cause of action which he urges before this Court.

It is by now well settled that, subject to certain limitations, a party convicted in a criminal proceeding may be estopped, in a subsequent civil proceeding, to relitigate those "questions 'distinctly put in issue and directly determined' in the criminal prosecution." *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569, 71 S.Ct. 408, 414,

95 L.Ed. 534 (1951). For a considerable length of time, concepts of mutuality of estoppel limited collateral estoppel effects to those cases where the parties to the subsequent suit were identical to, or in privity with, the parties in the prior litigation. The recent developments in the collateral estoppel doctrine, however, have relaxed the more technical aspects of the mutuality and privity restrictions, and have tended to favor a more pragmatic approach. The Fifth Circuit has stated that, regardless of mutuality principles, collateral estoppel may nevertheless be invoked where it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case.

Rachal v. Hill, 435 F.2d 59, 62 (5th Cir. 1970), *cert. denied*, 403 U.S. 904, 91 S.Ct. 2203, 29 L.Ed.2d 680 (1971).[5] These same principles apply where, as here, the basis for applying collateral estoppel principles is a prior criminal proceeding against one of the parties. *See, e.g., Breeland v. Security Insurance Co. of New Haven*, 421 F.2d 918, 921–23 (5th Cir. 1969); *Cardillo v. Zyla*, 486 F.2d 473, 475–76 (1st Cir. 1973).

---

[5] Under the circumstances present in the *Rachal* case, the Fifth Circuit held that the district court had inappropriately applied the collateral estoppel doctrine in rendering a summary judgment for the plaintiffs. As the basis for their collateral estoppel argument, the plaintiffs had invoked a prior injunctive proceeding brought against the defendants by the SEC in which the defendants had been found to have violated certain securities laws. Since the prior suit was equitable in nature, thus depriving the defendants of the opportunity to have their guilt or innocence determined by a jury, the Fifth Circuit felt it inappropriate to utilize that proceeding to determine the defendants' liability for the purposes of the subsequent civil suit. In Wolfson's case, of course, the defendants invoke prior litigation in which Wolfson was fully accorded his right to a jury trial.

Under the circumstances of this case, the Court concludes that it is appropriate to apply collateral estoppel to establish that Wolfson knew that the sale of his Continental stock ran afoul of the federal securities laws. It is difficult to imagine how this issue could have been more fully litigated that it was during Wolfson's criminal trial. If Wolfson declined to present any exculpatory evidence which was at his disposal, he did so at the risk of sustaining a criminal conviction. The record of his trial strongly suggests that nothing was held back, since as the Court has already recounted the primary defense theory was that Wolfson's violations of the law were not willful. Hence, for the purposes of this summary judgment motion, the Court holds that collateral estoppel precludes the existence of any genuine issue of fact regarding Wolfson's knowledge of the unlawful nature of his unregistered sales of Continental stock.

WOLFSON'S IMPLIED FEDERAL CLAIM UNDER NEW YORK STOCK EXCHANGE RULE 405

Having established that Wolfson knew that the sales were illegal, the Court must now consider what effect this has on the merits of Wolfson's case. Toward this end, the Court should first examine the theory of recovery asserted in the plaintiff's complaint as the basis for a federal cause of action.

[5] Counts I and II of the third amended complaint purport to invoke only this Court's federal question jurisdiction. Generally speaking, Count I alleges (1) that the defendants, both directly[6] and indirectly[7], owed the plaintiff a certain

---

[6] The individual defendant John Morley is alleged to be the chief perpetrator of the injuries suffered by the plaintiff.

[7] Reynolds is alleged to be liable for the acts and omission of John Morley under the *respondeat superior* doctrine. The liability of Reynolds alleged in Count I, in fact, is doubly vicarious; it is alleged to arise

duty of care[8] with respect to the defendants' handling of the plaintiff's sales of the Continental stock; (2) that the defendants breached their duty of care in the continental transactions; and (3) that as a proximate result of that breach, the plaintiff sustained certain damages arising out of (a) his criminal trial and conviction and (b) ensuing civil litigation brought against him on behalf of the ultimate purchasers of Continental stock. To establish the duty of care allegedly

---

because (1) Morley's wrongs were attributable to his employer, Kidder, through agency principles, and (2) Kidder's liabilities in that connection were attributable to Reynolds because Reynolds ultimately succeeded to all of Kidder's liabilities when it acquired Kidder's Jacksonville operation in 1963. Whether Reynolds did in fact succeed to these liabilities is still an open question. See fn. 9 *infra*.

[8] As the Court construes this portion of Wolfson's complaint, Wolfson specifically asserts two items as the basis for the duty of care owed him by the defendants: (1) the broker/customer agreements between him and Kidder and between him and Reynolds; and (2) Rule 405 of the Rules of the New York Stock Exchange. The defendants' potential liability under Rule 405 will receive extensive treatment in the body of this opinion. Since the broker/customer agreements are not specifically treated in that portion of the Court's opinion, it seems advisable to advert briefly to the analysis which the Court has used in connection with these agreements.

As they relate to a potential *federal* cause of action, the various broker/customer agreements are of only limited relevance. To the extent that any broker/customer agreement between Kidder and Wolfson, or between Reynolds and Wolfson, may underlie a garden-variety breach of contract action, Wolfson cannot invoke this Court's federal question jurisdiction in his efforts to obtain relief. Standing alone, the contract between a broker and his customer will usually involve only matters of state law. (One exception, embodied in 15 U.S.C. § 78cc (1970), is not even colorably applicable in this case.) Thus, any alleged breach of contract would be cognizable in this Court only upon the invocation of the Court's pendent jurisdiction. Insofar as Wolfson might rely upon his various broker/customer agreements to support a straightforward breach of contract action, the Court declines to exercise its pendent jurisdiction. The Court's reasoning is recounted in connection with its discussion of Counts III and IV of the complaint *infra*.

As the Court views it, then, the broker/customer agreements are relevant to a potential federal cause of action only insofar as they help

owned him by the defendants, Wolfson cites the "Customer's Agreements" between, on the one hand, A. M. Kidder & Co. and, on the other hand, Wolfson and various of his family members and business associates. These agreements are form documents wherein Kidder agrees, upon certain terms and conditions, to act as broker for the persons named. A sample copy of a typical customer agreement is attached to Wolfson's complaint as an exhibit. Additionally, Wolfson seeks to establish the defendants' duty of care by reference to the rules of the New York Stock Exchange (hereinafter NYSE), particularly Rule 405, the so-called "Know Your Customer" rule. Rule 405 reads as follows:

> Every member organization is required through a general partner or an officer who is a holder of voting stock to
>
> (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.
>
> (2) Supervise diligently all accounts handled by registered representatives of the organization.
>
> (3) Specifically approve the opening of an account prior to or promptly after the completion of any transaction for

---

illuminate the contours of the standard of care owed Wolfson by the defendants. As far as a federal claim is concerned, the same policy limitations (discussed *infra*) which operate to preclude Wolfson's recovery under Rule 405 similarly operate when the broker/customer agreements, rather than Rule 405, are used to establish the applicable standard of care. The gist of the Court's holding is that Wolfson's indisputable knowledge of the illegality of the relevant stock transactions forecloses the possibility of his recovery on a private claim implied under the federal securities laws. This foreclosure exists, of course, regardless of what standard of care is used to evaluate the defendants' conduct.

> the account of or with a customer, provided, however, that in the case of branch offices, the opening of an account for a customer may be approved by the manager of such branch office but the action of such branch office manager shall within a reasonable time be approved by a general partner or an officer who is a holder of voting stock in the organization. The member, general partner or officer approving the opening of the account shall, prior to giving his approval, be personally informed as to the essential facts relative to the customer and to the nature of the proposed account and shall indicate his approval in writing on a document which is a part of the permanent records of his office or organization.

Wolfson's claim in Count I and II is that, taken together, the Customer Agreement and Rule 405 provide the basis for a federal cause of action against Wolfson's former brokers.[9].

---

[9] There exists some genuine controversy over whether Reynolds could be held liable for the acts or omissions of John Morley occurring prior to 1963, the time when Reynolds purchased at least some of the assets of Kidder's Jacksonville office. Until that acquisition, Morley was associated with Kidder's Jacksonville operation, and he did not enter the employ of Reynolds until after Reynolds had bought out Kidder's Jacksonville office. Wolfson has alleged that Reynolds succeeded to Kidder's liabilities when it purchased the Kidder assets in question, and in the Court's view this allegation raises real questions of both law and fact. The Court has not been presented with evidentiary material sufficient to preclude a genuine issue of fact on the succession-of-liability question. Due to the Court's analysis of Wolfson's claim against Kidder, however, it is immaterial whether Reynolds could be held vicariously liable for the acts or omissions of John Morley while he was with the Kidder office. Thus, the presence of a genuine issue of fact does not foreclose the possibility of summary judgment, since the fact in issue is immaterial to the Court's resolution of this matter. *See Robbins v. Gould*, 278 F.2d 116, 120 (5th Cir. 1960); *Hahn v. Sargent*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). For the purposes of the instant motions, the Court will assume (without deciding) that Reynolds did in fact succeed to the liabilities of Kidder.

[6] In essence, Wolfson's federal claim is predicated upon the existence of a private, implied right-of-action against his securities brokers arising under the Securities Exchange Act of 1934. For some time now,[10] the federal courts have entertained private litigation over alleged violations of the federal securities laws, recognizing that the purposes and polciies of the securities laws can be effectively furthered by private as well as by governmental litigation. *See generally J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The access to federal courts for the vindication of private rights under the securities laws, however, is far from unlimited. As a threshold matter, *Borak* and its progeny dictate that the federal courts examine individual claims in the light of the policies to be served by the securities laws; if particular plaintiffs assert a claim consistent with the furtherance of federal policy in the securities field, then the courts are not reluctant to imply private causes of action for the purposes of federal question jurisdiction.

[7] Moreover, the existence of federal jurisdiction is not contingent solely upon alleged violations of the securities statutes or the rules promulgated thereunder by the Securities and Exchange Commission. Although the applicable statute, section 27 of the Securities Exchange Act of 1934[11], grants federal jurisdiction over suits "brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder", certain privately promulgated rules have been held to be "duties created by [the Securities

---

[10] The first reported case upholding an implied private right of action under the federal securities laws was *Kardon v. National Gypsum Co.*, 69 FSupp. 512 (E.D.Pa. 1946) (finding private cause of action under section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b–5 of the SEC).

[11] 15 U.S.C. § 78aa (1970).

Exchange Act of 1934]", and thus appropriately supportive of federal jurisdiction when they are allegedly breached. Chiefly, the reported cases involve alleged transgressions of certain internal rules of the NYSE. The theory of recovery under these rules of the Exchange was first articulated in Judge Friendly's widely-quoted dictum in *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817, 87 S.Ct. 40, 17 L.Ed.2d 56 (1966), and since that time numerous federal courts have had occasion to examine whether a private, federal cause of action can be grounded upon an alleged breach of NYSE rules. *See, e.g., McCormick v. Esposito*, 500 F.2d 620 (5th Cir. 1974); *Gordon v. duPont Glore Forgan, Inc.*, 487 F.2d 1260 (5th Cir. 1973); *Sanders v. John Nuveen & Co., Inc.*, 554 F.2d 790 (7th Cir. 1977); *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir.), *cert. denied*, 396 U.S. 838, 90 S.Ct. 98, 24 L.Ed.2d 88 (1969); *Utah State Univ. of Agriculture & Applied Science v. Bear, Stearns & Co.*, 549 F.2d 164 (10th Cir. 1977); *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 424 FSupp. 1021 (S.D.N.Y. 1977); *cf. Landy v. FDIC*, 486 F.2d 139 (3d Cir. 1973) (question of recovery under Rule 405 reserved).

In this case, Wolfson relies principally upon Rule 405 as the basis of his recovery in Counts I and II of his complaint. The defendants have moved to dismiss these counts under Rule 12(b)(6), Fed.R.Civ.P.[12], because these counts failed to

---

[12] Which provides in pertinent part that a party may raise by motion the defense of "failure of the pleading to state a claim upon which relief can be granted."

Although the Court's disposition of the defendants' motion for summary judgment makes it technically unnecessary to decide the "fraud" issue raised by the motion to dismiss, the Court feels that it should articulate its views on this matter in the event an appeal is taken. At the appellate stage, a reversal of this Court's ruling in favor of the defendants' motion for summary judgment would be likely to necessitate reaching the "fraud" issue raised in the defendants' motion to dismiss.

allege any fraud in connection with, and in addition to, the alleged breach of Rule 405. The defendants quite accurately point out the absence of any decision in which a federal court has sustained a private action for the breach of a stock exchange rule where there is no fraud alleged in connection with such breach. In fact, the prevalent view seems to hold that fraud is a necessary element of a plaintiffs' federal cause of action for a violation of a stock exchange rule. *See Sanders v. John Nuveen & Co., Inc., supra; Utah State Univ. of Agriculture & Applied Science v. Bear, Stearns & Co., supra.*

[8] It is quite true that Wolfson's third amended complaint contains no allegation of fraud on the part of John Morley, Kidder, or Reynolds. It is also true, however, that each of Counts I and II alleges that Morley and the brokerage firms violated Rule 405 "with reckless disregard of" the duty imposed by that rule.[13] Thus, Wolfson has alleged more than merely negligent behavior on the defendants' part, but less than full-blown fraudulent misconduct. The question which this Court must resolve for the purposes of the defendants' motion to dismiss, then, is whether an allegation of reckless misconduct sufficiently meets the *scienter* element of a cause of action under Rule 405.[14].

---

[13] Plaintiff's Third Amended Complaint, Count I at ¶ 19; *id.* Count II at ¶ 18.

[14] In a recent case, the Supreme Court reserved the question of whether recklessness meets the *scienter* element of a private cause of action based on section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b–5, 17 CFR § 240.10b–5 (1977). *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 194 n. 12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Subsequent to that decision, at least one Circuit has held that it does. *Sanders v. John Nuveen & Co., Inc.,* 554 F.2d 790, 792 (7th Cir. 1977).

In this Court's opinion, a reckless disregard of the duty imposed by Rule 405 is sufficient to sustain a cause of action for a breach of that rule.[15] Rule 405 imposes upon securities brokers broad obligations to learn the essential facts with respect to "every customer [and] every order," and the rule is obviously designed to further the protection of the investing public by requiring the (presumably more sophisticated) investment broker to take certain steps to determine whether the public—or the broker's customer—may be jeopardized by a given transaction. It seems clear to the Court that circumstances can exist—and for the purposes of the defendants' 12(b)(6) motion, the Court is bound to presume that they *do* exist—under which a broker's obligations to know his customer may be so recklessly disregarded as to be tantamount to fraud. As another court has written in a similar context, meeting the "tantamount to fraud" standard

> would mean that the violations operated as a fraud upon the plaintiff and that the defendants acted with *scienter*, that is, with intent to defraud or with willful and reckless disregard for the truth...

---

[15] In this connection, the Court views the recklessness standard as a far more stringent one than that of mere, or even extreme, negligence. As one court has stated in another context, reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Franks v. Midwestern Oklahoma Development Authority, CCH Fed.Sec.Rep. 95.786 at 90.850 (W.D.Okla. 1976). Thus, in order to prove that the defendants' conduct was "reckless" in this context, Wolfson would have to prove that they actually knew or should have known that Wolfson was required to register his Continental sales, and that their failure to inform him of this fact represented at least "an extreme departure from the standards of ordinary care."

Rolf v. Blyth Eastman Dillon & Co., Inc., 424 FSupp. 1021, 1041 (S.D.N.Y. 1977). In other words, if the defendants were actually aware of the potential legal shortcomings of Wolfson's Continental transactions, but recklessly disregarded those potential shortcomings, it is the Court's view that Wolfson could recover, under Rule 405, whatever damages he sustained as a result of the defendants' recklessness (assuming, of course, that the other elements of his claim have been proven). For that reason, the defendants 12(b)(6) motion to dismiss will be denied.

[9] Turning to the defendants' motion for summary judgment, the Court reiterates that Wolfson is estopped to deny that he knew of the registration requirements in connection with his sales of Continental stock. Through the collateral estoppel doctrine, the Court treats that fact as proven as a matter of law. The question then becomes whether Wolfson can prevail on the merits of Counts I and II of his complaint under any set of circumstances, once it is established that he knew of the illegality of his Continental transactions. In the Court's opinion, he cannot.

No reported Fifth Circuit case has squarely dealt with the elements of a private Rule 405 claim, or with the possible defenses thereto. Two cases, however, appear sufficiently analogous to inform this Court's view of the law in this area. In *Kuehnert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969), the plaintiff was a "tippee" who sought to recover, upon Rule 10b–5, from the insider who had supplied him with allegedly misleading information and the corporation in which he had invested. The district court had granted summary judgment for the defendants, *Kuehnert v. Texstar Corp.*, 286 FSupp. 340 (S.D.Tex. 1968), and the Fifth Circuit affirmed. The court concluded that the district court had properly invoked the doctrine of *in pari delicto* to bar the plaintiffs' recovery, reasoning that as a matter of policy a knowing party to a

wrongdoing should not be allowed to recover against others equally guilty of the wrongdoing. A more closely analogous case is *Gordon v. duPont Glore Forgan, Inc.*, 487 F.2d 1260 (5th Cir. 1973). In *Gordon*, a group of investors sued their broker for an alleged failure to notify them that their accounts had become undermargined. The plaintiffs argued that the court should imply a private cause of action under NYSE Rules 431 and 432, which prescribe certain substantive and record-keeping requirements in connection with brokers' maintenance of margin accounts. On appeal from a judgment in favor of the defendants,[16] the Fifth Circuit declined to reach the question of whether a private right of action exists for a breach of the NYSE rules in question. Instead, the Fifth Circuit pointed out that, as an undisputed fact, the plaintiffs knew that their accounts had become undermargined but acquiesced in the situation. The court then held that, even assuming that NYSE Rules 431 and 432 may undergird a private cause of action, the plaintiffs could not recover on that theory because they had had knowledge of the breach and had acquiesced therein. In effect, said the court, the investors and their brokers were *in pari delicto*, and for policy reasons the plaintiffs ought not to be allowed to recover under such circumstances.

In this Court's view, these two cases—particularly *Gordon*—strongly militate against allowing Wolfson to recover under the circumstances of this case. Wolfson's position vis-á-vis the broker/defendants is substantially similar to that of the *Gordon* plaintiffs. Since Wolfson actually knew that his Continental sales were legally deficient, it is the opinion of

---

[16] Although the lower court had entered a judgment in favor of the defendants as to the plaintiffs' claims based on the NYSE rules, the lower court had also entered a judgment in the plaintiff's favor based upon pendent state claims of breach of common-law fiduciary duty. The Fifth Circuit reversed this aspect of the district court's decision.

this Court that he cannot he heard to complain that his brokers recklessly failed to learn of and advise him of this legal deficiency.

[10, 11] To a great extent, the Court's conclusion that Wolfson's knowledge of the illegality of his Continental sales operates to bar his recovery under NYSE Rule 405 ultimately hinges upon an analysis of that rule itself. The Court is acutely aware of the fact that when it considers whether or not to imply a private remedy for the breach of the securities laws—or for that matter, any body of federal law which does not specifically provide for a private cause of action—a critical factor is whether the plaintiff is a member of the class which the laws in question were designed to protect. *See Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). It seems clear to the Court that NYSE Rule 405 was promulgated primarily for the protection of the innocent investor. The critical prescription for the purposes of this litigation appears in subsection (1), which directs the broker to "use due diligence to learn the essential facts relative to every customer [and] every order. . . ." This subsection clearly recognizes that the broker's profesisonal experience can furnish the investing public with an important safeguard against the pitfalls which necessarily exist in the complex legal and economic climate of the securities market.

In connection with the events alleged in his complaint, Wolfson simply cannot bring himself within the class of persons which Rule 405(1) was designed to protect. While he may argue that he was a member of the investing public at large, which he certainly was, his Rule 405 allegations sound on behalf of a narrower class of persons: those who may, for lack of knowledgability, needlessly suffer the consequences of their ignorance in a given transaction where the broker's due diligence in seeking out the facts of the matter would have avoided those consequences. For this reason,

Wolfson's knowledge of the facts and the law of his Continental transactions precludes his recovery under Rule 405.[17]

SPECIFIC ALLEGATIONS OF THE THIRD AMENDED COMPLAINT

[12] Since the Court has considered the fundamental theory of recovery underlying Wolfson's complaint and found that theory unavailable to Wolfson in the context of this case, all that remains is to examine the third amended complaint on a count-by-count basis and to express the Court's disposition of the case as to each of these counts.

In Count I, Wolfson seeks to recover from the defendants the damages allegedly caused by the defendants' reckless failure to inform him of the federal registration requirements in connection with his sales of Continental stock. Wolfson alleges that the defendants' breach of their duties proximately resulted in his indictment and conviction in the

---

[17] While the Court's reasoning may suggest the applicability of the *in pari delicto* defense, that defense is not the linchpin of the Court's analysis. It is somewhat problematic freely to apply common-law defenses to implied private causes of action under federal laws expressing policies of public protection. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968) ("We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes"); *Kuehnert*, 412 F2d at 705 (Godbold, J., dissenting). The Fifth Circuit apparently recognized and approved the *in pari delicto* defense, however, in both *Kuehnert* and *Gordon*. Since both of those cases involved assertions of private claims under NYSE rules (albeit not Rule 405) they are sufficiently analogous to Wolfson's case for the Court to infer that *in pari delicto* exists as a defense to alleged violations of Rule 405. Accordingly, and for the same reasons expressed in the text of this opinion, the Court alternatively holds that the defendants have a meritorious *in pari delicto* defense to Wolfson's Rule 405 claim for the purposes of the instant summary judgment motion.

Southern District of New York, as well as his joinder as a party defendant in four derivative actions brought by shareholders of Continental stock. No specific time period is alleged.

It is apparent that Wolfson cannot recover on this count of the complaint. As the Court has already discussed in some detail, Wolfson's knowledge of the illegality of his Continental sales effectively bars his recovery from the brokers who executed those sales. Even though the complaint is chronologically open-ended, so that the Court assumes that Wolfson's complaint is grounded upon Continental sales occurring subsequent to those underlying his criminal conviction, the critical fact of Wolfson's knowledge is conclusively established for all sales of Continental stock. Therefore, the defendants' motion for summary judgment with respect to Count I will be granted.

Count II is, by its terms, substantially similar to Count I and asserts the same basis for recovery. The only characteristic which distinguishes Count II from the prior count is that Count II is concerned with Wolfson's Continental sales executed after June 3, 1963 (the date when Reynolds took over the Kidder office), and seeks to recover against Reynolds only on the basis of John Morley's conduct while he was actually a Reynolds employee. Since Count II asserts the same grounds for recovery as Count I, the reasons previously articulated dictate a judgment for Reynolds on this count. Accordingly, the defendants' motion for summary judgment will be granted as to Count II.

Count III asserts two alternate bases of recovery. First, it alleges an implied federal cause of action against the defendants similar in principle to the theories underlying the previous two counts. Alternatively, Count III invokes this Court's pendent jurisdiction and seeks recovery under state

law, asserting a claim based upon the common-law tort of fraudulent misrepresentation.

Aside from the state law aspect of Count III, this count differs from its predecessors in that Wolfson alleges that the defendants fraudulently induced him to sell not only his Continental stock, but also shares in three other corporations: Universal Marion Corporation, Merritt-Chapman Scott Corporation, and American Motors Corporation. Since the Court has already determined that Wolfson has no federal claim in connection with his Continental sales, it is only the sales of stock in the other three croporations which might give rise to a federal cause of action in Count III.

These allegations are somewhat troublesome insofar as they alleged injury based on sale sof stock in corporations other than Continental. As to plaintiff's injuries resulting from the criminal conviction, of course, only the sales of Continental stock are involved, since only those sales were alleged in the indictment upon which Wolfson was eventually tried and convicted. The only other claim for damages in Count III arises out of Wolfson's defense to "four civil proceedings brught in the states of New York and Kentucky in 1966." Plaintiff's Third Amended Complaint, Count III, ¶¶ 10, 11(d). Upon examination, the complaint itself discloses that these civil actions, too, involve only Wolfson's Continental sales, since Paragraph Ten alleges that the civil actions were instituted by stockholders of Continental. The Court concludes, therefore, that Count III of the Third Amended Complaint contains no allegation of injury directly relating to the sales of stock in any corporation other than Continental.

[13] In the Court's view, this fact is fatal to Wolfson's cause of action under Count III. Wolfson's complaint embodied in Count III—both as to the federal and state causes

of action—essentially sounds in tort. Applying common law tort principles to Wolfson's federal claim, the Court believes that actual injury is a necessary element to private causes of action based on alleged violations of stock exchange rules. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). Wolfson has alleged no actual injuries proximately resulting from his sale of stock in any corporation other than Continental; therefore, it is the opinion of this Court that insofar as Count III alleges a private, federal cause of action for damages in connection with Wolfson's sale of stock in Universal Marion, Merritt-Chapman Scott, and American Motors, that count fails to state a claim upon which relief can be granted. As to the portion of Count III which seeks to recover under federal law, then, the defendants' motion to dismiss must be granted.

[14-16] That portion of Count III which seeks to recover upon state law by invoking this Court's pendent jurisdiction must fail for similar reasons. Count III clearly relies on state common-law principles of tort law, specifically upon the tort of fraudulent misrepresentation. As far as Wolfson's transactions in the stock of Universal-Marion, Merritt-Chapman Scott, and American Motors are concerned, once again the failure to allege any damages proximately resulting therefrom precludes Wolfson's recovery under Florida law,[18] since actual injury is a necessary element of that tort. *See Casey v. Welch*, 50 So.2d 124 (Fla. 1951); *Cape Cod Trust Co. v. Wixon*, 143 So.2d 339 (Fla.2d Dist.Ct.App. 1962).

---

[18] In connection with the allegations of Wolfson's complaint which seek to recover solely under state law, Wolfson claims a cause of action "under the laws of the State of New York and of Florida." It is now well settled, of course, that as to state law matters a federal district court applies the choice of law rules which govern actions brought in the state courts of the forum state. *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020,

[17, 18] As additional grounds for dismissing that part of Count III which purports to rely upon state law, the Court would note that since it has already been determined that Wolfson cannot prevail in this case under federal law, the Court may dismiss the pendent state claims in the exercise of its discretion.[19] In this case, the Court feels that to the extent that Count III alleges a claim under state law, a dismissal is in order. Despite the length of time since Wolfson first filed a complaint in this cause, this litigation is still in its early stages. By previous order, discovery has been strictly limited to items of threshold importance; thus, the parties have to date incurred only a fraction of what the eventual costs of this litigation would amount to. Were the Court to retain jurisdiction over Wolfson's state claims the Court would be in effect placed in the position of trying a state case of somewhat dubious merit where diversity of citizenship does not even arguably exist. Especially in light of the crowded conditions of this Court's civil docket, that

---

85, L.Ed. 1477 (1941). In tort actions, the Florida courts still apply the traditional choice of law rule *lex loci delicti*, determining the substantive issues in a case by looking to the law of the state where the tort occurred. *Astor Electric Service, Inc. v. Cabrera*, 62 So.2d 759 (Fla. 1952); *Ganem v. Ganem de Issa*, 269 So.2d 740 (Fla.3d Dist.Ct.App. 1972), *cert. denied*, 414 U.S. 1113, 94 S.Ct. 844, 38 L.Ed.2d 740 (1973). Since Wolfson's complaint discloses that the fraudulent misrepresentations of the defendants, if any, occurred in Florida, the Court has chosen to apply Florida law in addressing Wolfson's substantive claims under state law.

[19] The seminal case articulating modern concepts of pendent jurisidiction, *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), contains the bald statement that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 726, 86 S.Ct. at 1139. Subsequent developments suggest, however, that the dismissal of the pendent state claims is discretionary rather than mandatory. *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *O'Connell v. Economic Research Analysts, Inc.*, 499 F.2d 994, 996 (5th Cir. 1974); *Brunswick v. Regent*, 463 F.2d 1205 (5th Cir. 1972).

course of action seems clearly ill-advised. For these reasons, the defendants' motion to dismiss will be granted as to that portion of Court III which seeks to recover under state law.

Count IV of Wolfson's complaint relies wholly on pendent jurisdiction and seeks to recover punitive damages under state law for the intentional torts recounted in the previous portions of his complaint. For the reasons outlined in the preceding paragraph, the defendants' motion to dismiss Count IV will be granted.

For the foregoing reasons, the Court will direct the Clerk to enter final judgment for the defendants as to each count of Wolfson's third amended complaint with prejudice, costs to be taxed to the plaintiff.

Opinion of the Court of Appeals

LOUIS E. WOLFSON,

Plaintiff-Appellant,

v.

JOHN D. BAKER, JR., et al.,

Defendants-Appellees.

No. 78-2072

United States Court of Appeals,
Fifth Circuit

Aug. 14, 1978.

(Rehearing denied Oct. 6, 1980)

[623 Fed.2d 1074]

Investor sued stockbroker and others to recover under federal securities law and state common law of misrepresentation for alleged failure to inform investor that his corporate stock holdings were substantial enough to require filing of registration statement as a condition precedent to sale of large quantities of the stock in a short period. The United States District Court for the Middle District of Florida, Howell W. Melton, J., granted summary judgment for defendant with respect to two counts of investor's complaint, and dismissed the other two counts with prejudice, 444 FSupp. 1124, and investor appealed. The Court of Appeals, Randall, Circuit Judge, held that: (1) District Court properly applied doctrine of nonmutual collateral estoppel to establish investor's knowledge of illegality of his sales of the stock; (2) investor's claim was barred by doctrine of in pari delicto; (3) District Court properly dismissed count of investor's complaint which stated, inter alia, a federal claim for fraudulent

misrepresentations which allegedly induced investor to sell shares in three corporations in addition to shares in another corporation, sales of which had resulted in investor's prior criminal conviction, where his allegations of damages related only to sales of shares in the latter corporation; and (4) District Court did not err in denying discovery to investor.

Affirmed.

1. Judgment 648

Use of a prior conviction to collaterally estop a party in a subsequent action does not depend upon an attempt by that party to benefit from the crime.

2. Judgment 648

In assessing whether doctrine of collateral estoppel applies in a later civil action regarding an issue decided in a prior criminal action, prior inquiry is whether issue for which estoppel is sought was distinctly put in issue and directly determined in the criminal action; when the criminal conviction was based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment.

3. Judgment 648

Where issue whether investor knew that registration statement was required in connection with sales of large quantities of stock in a short period was exhaustively litigated in proceedings resulting in his criminal conviction of violating the securities laws by failing to file such statement, the investor was collaterally estopped, in subsequent private civil suit charging stockbrokers with breaching stock exchange rule by failing to advise him of the registration requirement, from claiming lack of knowledge of such

requirement, even if prosecution in the criminal trial had withheld exculpatory evidence from him and even if prosecution's key witness against him had committed perjury. Securities Act of 1933, §§ 5, 24, 15 U.S.C.A. §§ 77e, 77x.

4. Judgment 648

Mutuality of estoppel is not required in order for a prior criminal conviction to be given collateral estoppel effect in a subsequent civil case.

5. Securities Regulation 102

Stockbroker partnership's pari delicto defense barred investor's claim for damages resulting from broker's alleged violation of New York Stock Exchange "Know Your Customer" rule which allegedly caused investor's failure to comply with registration requirements in connection with sales of large blocks of corporate stock. Securities Act of 1933, §§ 5, 24, 15 U.S.C.A. §§ 77e, 77x.

6. Securities Regulation 137

District court properly dismissed count of investor's complaint filed against stockbroker partnership which asserted both federal and state claims based on fraudulent misrepresentations which allegedly induced investor, who had been convicted of violations of provisions of the Securities Act of 1933 in connection with sale of unregistered stock of a corporation, to sell his stock in such corporation and three other corporations where investor alleged no injuries with respect to shares in corporations other than the former corporation. Securities Act of 1933, §§ 5, 24, 15 U.S.C.A. §§ 77e, 77x.

7. Federal Courts 895

In action brought by investor against stockbroker partnership to recover for damages allegedly resulting from

partnership's breach of stock exchange rule by failing to advise investor of registration requirement, even if district court erred in limiting investor's discovery of information which allegedly would have enabled him to uncover information sufficient to preclude involcation of collateral estoppel against him, such error did not require reversal where the doctrine of collateral estoppel had been properly invoked and discovery would not have aided investor in any way.

William H. Maness, Jacksonville, Fla., Saxe, Bacon & Bolan, Roy M. Cohn, New York City, for plaintiff-appellant.

Mahoney, Hadlow & Adams, Thomas M. Baumer, Jacksonville, Fla., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before MORGAN, ANDERSON and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

In 1967, Appellant Louis E. Wolfson was convicted following a jury trial in the Southern District of New York 444 F. Supp. 1124 on nineteen counts of an indictment charging him with violating and conspiring to violate sections 5 and 24 of the Securities Act of 1933, 15 U.S.C. §§ 77e and 77x, in connection with the sale of unregistered stock of Continental Enterprises, Inc. (Continental). Wolfson was sentenced to concurrent prison terms of one year on each count and was fined $100,000. The conviction was affirmed on appeal. *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S.Ct. 1275, 22 L.Ed.2d 479 (1969). A motion for a new trial on the basis of newly

discovered evidence was denied following an extended evidentiary hearing, *United States v. Wolfson*, 297 FSupp. 881 (S.D.N.Y. 1968), and the denial of the motion was affirmed on appeal, *United States v. Wolfson*, 413 F.2d 804 (2d Cir. 1969).

In 1970, Wolfson filed a civil suit in the Middle District of Florida against the Appellees. The one-count complaint purported to state an implied. private cause of action under the federal securities laws. As a result of a series of motions by the Appellees, Wolfson filed his third amended complaint, which the district court described as follows:

> The plaintiff's third amended complaint sets forth four counts. Although it alleges a plethora of named defendants, there are only two real defendants in this case: (1) Reynolds & Company (hereinafter "Reynolds"), a New York partnership which engages in the securities brokerage business, and (2) the estate of John Morley, who prior to his death acted as the plaintiff's stockbroker for a number of years. Essentially, it is the actions of John Morley which underlie all of the plaintiff's claims.
>
> Count I of the third amended complaint purports to state a private, implied right-of-action arising under the Securities Exchange Act of 1934 and certain rules and regulations of the Securities and Exchange Commission (hereinafter "SEC"). This count alleges in pertinent part that (1) beginning in 1943, John Morley acted as the stockbroker for the plaintiff Wolfson and his business associates; (2) that prior to June 1963 Morley was employed by the brokerage firm of A. M. Kidder & Company (hereinafter "Kidder"); (3) that after June of 1963 Morley was employed by the defendant Reynolds; (4) that at all times during their broker/customer relationship Morley (and, vicariously, the defendant Reynolds) owed the plaintiff a

duty of care by virtue of (a) a series of signed agreements known as "broker/customer" agreements, setting forth certain terms and conditions of the relationship, and (b) Rule 405 of the New York Stock Exchange, the terms of which are fully set forth hereinafter; (5) that in connection with certain sales by the plaintiff of his capital stock in [Continental], the duty of care enumerated in item (4) *supra* was "recklessly disregard[ed]"; (6) that as a proximate result of (5) the plaintiff was indicted and convicted in the United States District Court for the Southern District of New York on September 29, 1967, for violating section 5 of the Securities Act of 1933 [15 U.S.C. § 77e (1970)]; (7) that as a further proximate result of (5) the plaintiff has been joined as a party defendant in four civil suits brought in Kentucky and New York by shareholders of Continental claiming damages in excess of two million dollars; and (8) that the plaintiff has, as a result of his criminal conviction, sustained certain specified damages. Count I admits that prior to June of 1963 the defendant Morley was employed not by the defendant Reynolds but by Kidder, but this count also alleges that Reynolds succeeded to the liabilities of Kidder when it acquired certain of Kidder's assets in 1963.

Count II also purports to state an implied private claim under the Securities Exchange Act of 1934. It realleges much of Count I verbatim, but by its terms is limited to the transactions in Continental stock occurring after June of 1963—the date when Reynolds bought out Kidder's Jacksonville office and employed John Morley—and seeks to recover for those transactions in Continental stock for which Reynolds is liable as the direct employer of Morley, *i.e.*, independent from whatever liabilities Reynolds might have succeeded to when it acquired Kidder's Jacksonville assets.

Count III purports to state claims under both federal and state law, invoking the Court's pendent jurisdiction as to the latter claims. It alleges that while acting on behalf of Kidder and the defendant Reynolds, the defendant Morley willfully and fraudulently misrepresented to the plaintiff that he could engage in the purchase and sale of stock in Continental and three other corporations without running afoul of the prohibitions of any federal or state securities laws. Count III further alleges that the defendants' fraudulent misrepresentations proximately resulted in the criminal conviction and civil litigation previously recounted, and the damages incurred thereby.

Count IV alleges that, under state law, Wolfson is entitled to recover punitive damages for the transgressions alleged in the preceding three counts. This count is wholly dependent upon the Court's exercise of its pendent jurisdiction, since no claim is asserted under federal law.

Wolfson v. Baker, 444 FSupp. 1124, 1126–27 (M.D.Fla. 1978) (footnote omitted).[1] Appellees moved to dismiss or, in the alternative, for summary judgment. The district court denied recovery to Wolfson on all four counts of the complaint; it granted summary judgment with respect to Counts I and II, and dismissed Counts III and IV with prejudice under Fed.R.Civ.P. 12(b)(6).

With respect to Counts I and II, after carefully reviewing the record of Wolfson's criminal trial and the issues litigated therein, the district court applied the doctrine of nonmutual collateral estoppel to prevent Wolfson from denying "that, at the time of the stock transactions alleged in the indictment upon which is was tried and convicted, he knew that the

[1] Wolfson admits in his brief to this Court that the district court's summary of the basis of his complaint is accurate.

securities laws required that he file a registration statement before engaging in those transactions." 444 FSupp. at 1128. The trial court determined that Wolfson had a full and fair opportunity to litigate the issue of his knowledge, that the issue of his knowledge had been directly determined in the criminal trial, and that no injustice would result from the application of collateral estoppel in this case. After treating the threshold issue of the applicability of nonmutual collateral estoppel, the district court turned to the effect of its application of collateral estoppel on the merits of Wolfson's case. It denied Appellees' motion to dismiss Counts I and II under Rule 12(b)(6), holding that an implied private right of action exists under NYSE Rule 405, and that "reckless disregard of the duty imposed by Rule 405 is sufficient to sustain a cause of action for a breach of that rule." *id.* at 1134. The district court, however, granted summary judgment for Appellees on Counts I and II on the basis that Wolfson's knowledge that a registration statement was required for his transactions in continental stock precluded recovery on two alternative grounds. First, noting that a critical factor in determining whether a private right of action exists is whether the plaintiff is a member of the class which the laws in question were designed to protect, the district court held that Rule 405 protects innocent investors and that Wolfson was unable to bring himself within that class. Second, the court held that the Appellees had a meritorious in pari delicto defense to the Rule 405 claim. With respect to Count III, which asserted both federal and state claims based on fraudulent misrepresentations which allegedly induced Wolfson to sell his stock in Continental and three other corporations, the district court granted the Appellees' motion to dismiss under Rule 12(b)(6) on the basis that the complaint alleged no actual injury directly related to the sale of stock in corporations other than Continental. As

an alternative ground for the dismissal of the state claim in Count III, the district court noted its discretionary power to dismiss the entirely pendant state claim in the absence of a surviving federal claim. With respect to Count IV of the complaint, which relied wholly on pendant jurisdiction, the district court granted the motion to dismiss.

Wolfson asserts four points of error on appeal: (1) the district court erred in applying the doctrine of nonmutua collateral estoppel to establish Wolfson's knowledge of the illegality of his sales of Continental stock; (2) the district court erred in holding that Wolfson's claim was barred by the doctrine of in pari delicto; (3) the district court erred in dismissing Count III of the complaint; and (4) the district court erred in denying discovery to Wolfson.

After a careful consideration of the issues raised on appeal, we affirm the judgment of the district court.

Collateral Estoppel

The threshold question in this case is whether the district court properly invoked the doctrine of nonmutual collateral estoppel to establish Wolfson's knowledge that a registration statement was required for his sales of Continental stock. Wolfson argues that the district judge erred in applying collateral estoppel because (1) a criminal conviction cannot work an estoppel in a subsequent civil case; (2) mutuality of estoppel is required; (3) Wolfson's knowledge of the illegality of the sales of Continental stock cannot be inferred from the jury verdict in the criminal trial; and (4) the application of collateral estoppel in this case would result in an injustice. We disagree.

[1] The Supreme Court and this court have held that the general doctrine of collateral estoppel, which bars relitigation of an issue actually and necessarily decided in a prior action, *see, e.g.*, 1B J. Moore, Federal Practice ¶ 0.441 (2d

ed. 1974), is "as applicable to the decisions of criminal courts as to those of civil jurisdiction." *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568, 71 S.Ct. 408, 414, 95 L.Ed. 534 (1951), quoting *Frank v. Mangum*, 237 U.S. 309, 334, 35 S.Ct. 582, 589, 59 L.Ed. 969 (1915); *Willard v. United States*, 422 F.2d 810 (5th Cir.), *cert. denied*, 398 U.S. 913, 90 S.Ct. 1714, 26 L.Ed.2d 76 (1970); *Breeland v. Security Insurance Co.*, 421 F.2d 918, 921–23 (5th Cir. 1969); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 264–65 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 157, 83 S.Ct. 554, 561, 9 L.Ed.2d 644 (1963); *Cardillo v. Zyla*, 486 F.2d 473 (1st Cir. 1973); *Metros v. United States District Court*, 441 F.2d 313 (10th Cir. 1970).[2]

[2, 3] In assessing whether the doctrine of collateral estoppel applies in the later action, the proper inquiry is whether the issue for which estoppel is sought was "distinctly put in issue and directly determined" in the criminal action. *Emich Motors*, 340 U.S. at 569, 71 S.Ct. at 414. When the criminal conviction was based on a jury verdict of guilty, "issues which were essential to the verdict must be regarded as having been determined by the judgment." *Id.* The district court, therefore, reviewed the record of the

---

[2] Wolfson asserts that a party's attempt to obtain or retain the profits of the illegal conduct for which he was convicted is a prerequisite for the invocation of collateral estoppel. While such a rule may obtain in other jurisdictions, *see generally* 46 Am.Jur.2d *Judgments* § 618 (1969 & Supp. 1979), and at least one of our prior cases appears to have relied on the "attempt to benefit from the crime" rationale, *see Hardin v. Aetna Casualty & Surety Co.*, 384 F.2d 718, 719 (5th Cir. 1967), *cert. denied*, 391 U.S. 971, 88 S.Ct. 2047, 20 L.Ed.2d 886 (1968), it is clear from our examination of the cases cited above that, in this Circuit, the use of a prior conviction to collaterally estop a party in a subsequent action does not depend upon an attempt by that party to benefit from the crime.

criminal litigation in order to determine whether Wolfson's knowledge of the registration requirement for the Continental stock was essential to the jury's verdict. It described the criminal trial as follows:

> The indictment upon which Wolfson was tried and convicted contained nineteen counts. Count One alleged that Wolfson had conspired with various other persons to violate sections 5 and 24 of the Securities Act of 1933, 15 U.S.C. §§ 77e and 77x (1970). Counts Two through Nineteen alleged substantive violations of the same statutes in connection with eighteen specified sales of large blocks of stock in Continental Enterprises, Inc., allegedly executed at Wolfson's direction between October 5, 1961, and January 9, 1962. Succinctly stated, the gravamen of the government's case was that Wolfson's (and his close associates') holdings in Continental stock were substantial enough to require the filing of a registration statement with the SEC as a condition precedent to Wolfson's sale of his Continental stock in such large quantities during such a short period of time. It was undisputed that the sales of stock in question were not accompanied by any registration statement. As a predicate for Wolfson's criminal liability, the terms of 15 U.S.C. § 77x (1970) required that the government prove—beyond a reasonable doubt, of course—that Wolfson's failure to file the requisite documents with the SEC was a willful act on Wolfson's part.
>
> Much of the government's case against Wolfson rested on undisputed facts. No one denied that the alleged sales of Continental stock had been made. In fact, no one seriously challenged the government's assertion that the sales in question ran afoul of the securities laws due to the lack of an accompanying registration with the SEC. Wolfson's defense focused almost entirely upon the willfulness element of the crimes alleged—briefly put, Wolfson

claimed ignorance. He maintained that while, perhaps, technical violations of the law had occurred, he had had no knowledge of any illegality in connection with the Continental stock sales.

The issue of whether Wolfson actually knew that his sales of Continental stock were legally deficient was, by far, the most hotly contested issue at Wolfson's trial. During its case-in-chief, the government called a number of securities brokers through whom Wolfson (or one of his associates) had sold various blocks of Continental stock. In the case of most of these brokers, Wolfson's sell orders had been relatively small. Defense counsel cross-examined each broker thoroughly on the subject of whether he had discussed the registration question with Wolfson or one of his subordinates, and none could recall having had any such discussions. With only one exception, the defense made no attack on the credibility of the brokers' testimony.

The one exception was the testimony of John Morley. During the time period alleged in the indictment, Morley had been a registered broker with the firm of A. M. Kidder & Company, a brokerage house with its principal offices in New York City. Morley was with Kidder's Jacksonville office, and had in fact been one of Wolfson's stockbrokers for a number of years prior to the allegedly illegal sales of Continental stock. It was with Morley that Wolfson placed the most substantial sell orders for his shares of Continental.

The defense strategy was to depict Morley as the one person who should havve recognized the registration problems in the Continental transactions and should have informed Wolfson of these problems. In furtherance of this strategy, the defense position was that while Morley

knew of or should have known of the applicable registration requirements, he neglected to call the requirements to Wolfson's attention for fear of aborting the transactions and losing the rather substantial commissions which Wolfson's Continental sales had generated.

After the government had rested its case, the defense continued it strategy of casting doubt upon whether Wolfson had known the illegal nature of what he was doing. In this connection, the crucial witness was Wolfson himself. After first calling several stockbrokers, an investment consultant, and a multitude of character witnesses, Wolfson took the stand and flatly denied any knowledge of the legal shortcomings of his Continental sales. . . .

When the defense had rested, the government succeeded in introducing a damning piece of rebuttal evidence. The government produced an internal memorandum, dated in 1950, from the files of the SEC. The memorandum tended to indicate that at that time Wolfson had met with SEC officials and had discussed the federal registration requirements pertaining to a transaction substantially similar to Wolfson's Continental sales. The memorandum was introduced, of course, to show that Wolfson was well aware of the legal restrictions of his unregistered sale of the Continental stock.

Not surprisingly, the closing arguments of counsel focused heavily on the issue of Wolfson's knowledge of the securities laws which he had alleged violated. Defense counsel skillfully summarized the evidence in the case which tended to show Wolfson's ignorance, and in fact devoted the bulk of his argument to this very subject. Subsequent to the closing arguments, the trial court instructed the jury at some length, and included specific and comprehensive instructions on the knowledge/

willfulness issue. Eventually, the jury returned a guilty verdict against Wolfson as to all nineteen counts of the indictment.

444 FSupp. at 1128–30. We think that the district court's description of the criminal trial is accurate. In light of the willfulness requirement of 15 U.S.C. § 77x, the indictment, the evidence and arguments of counsel at trial, and the trial court's instructions to the jury,[3] we are convinced that the district court properly concluded that "Wolfson's knowledge of the registration requirements . . . was an exhaustively litigated issue, and that the jury's verdict against Wolfson necessarily rests upon a finding that Wolfson's claims of ignorance were insufficient to create a reasonable doubt of his criminal culpability." 444 FSupp. at 1130.[4]

[4] Wolfson next contends that mutuality of estoppel is required in order for a prior criminal conviction to be given collateral estoppel effect in a subsequent civil case. We disagree. Ten years ago, in *Rachal v. Hill,* 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904, 91 S.Ct. 2203, 29 L.Ed.2d 680 (1971), we noted the modern trend toward rejection of the mutuality of estoppel rule, and rejected it in the context of a civil case in which collateral estoppel was sought on the basis of a prior civil judgment. Since *Rachal,* the Supreme Court has adopted our position on that issue in *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 91 S.Ct.

[3] We note that the trial court repeatedly charged the jury that they were required to find beyond a reasonable doubt, as an essential element of the crime, that Wolfson knew that a registration statement was required for his sales of Continental stock.

[4] In *United States v. Wolfson,* 405 F.2d at 781–82, the Second Circuit, in affirming Wolfson's conviction, expressed doubts with respect to the validity of Wolfson's defense that he "operated at a level of corporate finance far above such 'details' as the securities laws [with respect to] whether a particular stock must be registered." We reject Wolfson's contention that the dictum in that opinion concerning Wolfson's defense constitutes a holding that knowledge of the registration requirement is not an essential element of the crime for which Wolfson was convicted.

1434, 28 L.Ed.2d 788 (1971) (defensive collateral estoppel), and *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (offensive collateral estoppel). Though our research does not disclose any case in which this Circuit has eliminated the mutuality requirement in the context of a civil case in which collateral estoppel is sought on the basis of a prior criminal conviction, we fail to perceive any reason why the rejection of the mutuality rule in a context in which both the prior and subsequent actions were civil should not apply equally when the prior action was criminal.[5]

Wolfson correctly contends that a party against whom an adverse determination has been made on an issue in a prior action will not invariably be prevented from relitigating that issue. The Supreme Court and this court have held that nonmutual collateral estoppel will be applied only where there was a "full and fair" opportunity in the first action to litigate the issue for which collateral estoppel is sought, *Parklane Hosiery,* 439 U.S. at 326–33, 99 S.Ct. at 648–52; *Blonder-Tongue,* 402 U.S. at 332–33, 91 S.Ct. at 1444–45; *Johnson v. United States,* 576 F.2d 606, 614–15 (5th Cir. 1978); *Rachal v. Hill,* 435 F.2d at 62. In addition, we have said that nonmutual collateral estoppel will not be invoked if "some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case." *Rachal v. Hill,* 435 F.2d at 63, quoting *Bruszewski v. United States,* 181 F.2d 419, 421 (3rd Cir.), *cert. denied,* 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950). *See also Johnson v. United States,* 576 F.2d at 614.

---

[5] Other circuits have abandoned the mutuality requirement in civil cases in which invocation of collateral estoppel was sought on the basis of a prior criminal conviction. *See, e.g., United States v. Frank* 494 F.2d 145, 160 (2d Cir.), *cert. denied,* 419 U.S. 828, 95 S.Ct. 48, 42 L.Ed.2d 52 (1974); *Cardillo v. Zyla,* 486 F.2d 473 (1st Cir. 1973).

It is beyond dispute that Wolfson had a full and fair opportunity to litigate the issue whether he knew of the registraiton requirement for his sale of Continental stock in the sense that he was motivated by the serious criminal charges to "litigate and to litigate to the finish," *Blonder-Tongue*, 402 U.S. at 332, 91 S.Ct. at 1444, and that the full array of procedural protection was available to him there. Instead, he argues that he was denied a full and fair opportunity to litigate the issue of his knowledge and that application of collateral estoppel would result in an injustice because, at the criminal trial, the prosecution allegedly withheld certain material exculpatory evidence from him and because the prosecution's key witness against him, John Morley, allegedly committed perjury as part of a conspiracy between Morley and other brokers, the object of which was to convict Wolfson and to escape criminal and civil liability for themselves. Even if we assume that Wolfson's allegations of perjury and withholding of exculpatory evidence are true, we do not think that they are sufficient to defeat the invocation of collateral estoppel in this case. In view of the fact that the record on its face does not disclose the lack of a full and fair opportunity for Wolfson to litigate the knowledge issue, and the fact that Wolfson has an opportunity to collaterally attack his conviction in a coram nobis proceeding[6] in New York, where his criminal trial was held,[7] we fail to discern

---

[6] Since Wolfson has served his sentence for the criminal conviction, he is no longer "in custody," and coram nobis is the appropriate remedial avenue for his claims. *See Carbo v. United States*, 581 F.2d 91 (5th Cir. 1978).

[7] We note that Wolfson's first petition for writ of error coram nobis was denied by Judge Palmieri of the Southern District of New York, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (July 26, 1976), and the denial of the petition was affirmed by the Second Circuit, *United States v. Wolfson*, 558 F.2d 59 (2d Cir. 1977). Subsequently, Wolfson filed a second coram nobis petition, which raised, inter alia, the same issues

any injustice in refusing to allow relitigation of the knoewledge issue here. *Cf. Brazzell v. Adams,* 493 F.2d 489 (5th Cir. 1974) ("[w]e are satisfied that the general rule should be followed, especially where, as here, the party barred by collateral estoppel has the option of challenging the earlier adjudication through a habeas corpus petition.").[8] We therefore hold that the district court properly invoked the doctrine of nonmutual collateral estoppel to establish Wolfson's knowledge that a registration statement was required for his sales of Continental stock.

The Merits

After addressing the threshold question of the applicability of the doctrine of collateral estoppel and determining that Wolfson knew that his sales of unregistered Continental stock were illegal, the district court considered the effect of Wolfson's knowledge on the merits of his case. First, the district court held that an implied federal right of action exists for a breach of NYSE Rule 405,[9] and that "reckless

---

with respect to the criminal trial that Wolfson has presented here. That petition was denied by Judge Gagliardi of the Southern District of New York, Unpublished Memorandum Opinion, Dkt. No. 66 Civ. 720 (Feb. 20, 1980), and Wolfson's apeal from the denial of the petition is currently pending before the Second Circuit.

[8] The First Circuit has invoked nonmutual collateral estoppel in the context of a suit brought by a convicted defendant based on a claim that the defendants in the civil case committed perjury at his criminal trial. *Cardillo v. Zyla,* 486 F.2d 493 (1st Cir. 1973).

[9] NYSE Rule 405, often called the "Know Your Customer" rule, provides in pertinent part:

> Every member organization is required through a general partner or an officer who is a holder of voting stock to
>
> (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried

disregard" of the duty imposed by the rule is sufficient to sustain a cause of action for the breach of the rule. Second, the district court held that Wolfson's knowledge of the illegality of his sales of Continental stock barred him from recovery on his Rule 405 claim. This holding was based on two alternative grounds: (1) since Wolfson could not bring himself within the class of innocent investors for whose benefit Rule 405 was designed, allowing him to maintain a private cause of action would be inappropriate under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); and (2) the Appellees had a meritorious in pari delicto defense which barred Wolfson's claim.

Because we hold that the district court properly applied the in pari delicto defense to bar Wolfson's claim under the circumstances of this case, we need not and do not decide whether an implied federal cause of action exists for a breach of NYSE Rule 405.[10]

In holding that the defense of in pari delicto barred recovery by Wolfson, the district court relied on two cases from our circuit, *Kuehnert v. Texstar Corp.*, 412 F.2d 700

---

by such organization and every person holding power of attorney over any account accepted or carried by such organization.

(2) Supervise diligently all accounts handled by registered representatives of the organization.

(3) Specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a customer. . . . The member, general partner or officer approving the opening of the account shall, prior to giving his approval, be personally informed as to the essential facts relative to the customer and to the nature of the proposed account and shal indicate his approval in writing on a document which is a part of the permanent records of his office or organization.

[10] Likewise, because we hold that the district court properly applied the in pari delicto defense, we need not address the district court's alternative reason for barring recovery.

(5th Cir. 1969), and *Gordon v. duPont Glore Forgan, Inc.*, 487 F.2d 1260 (5th Cir. 1973), *cert. denied*, 417 U.S. 946, 94 S.Ct. 3071, 41 L.Ed.2d 666 (1974). In *Kuehnert*, we held that the in pari delicto defense is available to defendants under certain circumstances in private suits for violation of the securities laws. There the plaintiff, a "tippee," brought suit to recover under Rule 10b–5 from a corporation whose stock he had purchased and from an insider who had allegedly given him misleading information. Characterizing the plaintiff as "in fact a dupe, but [one] who believes he is a tippee with a duty to disclose, and who endeavors to take wrongful advantage of his tip," 412 F.2d at 703, we concluded that the plaintiff's illegal conduct placed him in pari delicto with the insider. Having decided that the plaintiff's conduct made the defense of in pari delicto available, we held that the application of the defense in a particular case rests in the discretion of the district court, and that "[the] question must be one of policy: which decision will have the better consequences in promoting the objective of the securities laws by increasing the protection to be afforded the investing public." 412 F.2d at 704. Reasoning that "no sufficient public interest [exists] when the only question is one of accounting between joint conspirators," *id.* at 703, and that "[i]f a tippee can sue he has, in effect, an enforceable warranty that secret information is true," *id.* at 705, we held that the district court properly allowed the in pari delicto defense under the circumstances of that case.

Subsequently, in *Gordon*, we denied recovery to a group of investors who sued their broker under NYSE Rules 431 and 432 for failure to notify them that their accounts had become undermargined. There, we reasoned that even if a private right of action exists for breach of Rules 431 and 432, because it was undisputed that the plaintiffs knew that their accounts had become undermargined and that they

had acquiesced in the situation, the investors were in pari delicto with the brokers and should not be allowed to recover for policy reasons. We rejected "an approach that so unilaterally favors the stock purchaser at the expense of his broker," 487 F.2d at 1263, citing Judge Friendly's admonition in *Pearlstein v. Scudder & German*, 429 F.2d 1136, 1148 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 401 U.S. 1013, 91 S.Ct. 1250, 28 L.Ed.2d 550 (1971), that

> [a]ny deterrent effect of threatened liability on the broker may well be more than offset by the inducement to violations inherent in the prospect of a free ride for the customer who . . . is placed in the enviable position of "heads-I-win tails-you-lose."

[5] Under the principles set out in *Kuehnert* and *Gordon*, we think the district court was correct in barring recovery by Wolfson. Because Wolfson knew that his sales of Continental stock ran afoul of the securities laws, he is plainly in pari delicto with the Appellees who, he contends, had a duty to tell him that the sales were illegal. Even if Wolfson's allegations with respect to the Appellees' duties and conduct are taken as true, since Wolfson was the seller of the securities and recognized the illegality of the sales, the fault of the parties was "mutual, simultaneous, and relatively equal." *Woolf v. S. D. Cohn & Co.*, 515 F.2d 591, 603 (5th Cir. 1975), *vacated and remanded on other grounds*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). In light of the policy reasons articulated in *Gordon* for denying recovery under closely analogous circumstances, and the fact that Wolfson has failed to articulate any reason why the investing public would be better served by a rule which would allow him to recover against his brokers, we think the district court properly exercised its discretion in applying the pari delicto defense in this case.

Count III of the Complaint

[6] Wolfson's third contention is that the district court incorrectly determined that Count III of the complaint, which stated, inter alia, a federal claim for fraudulent misrepresentations which allegedly induced Wolfson to sell shares in Continental and three other corporations, failed to allege any injury directly relating to the sales of stock in any corporation other than Continental.[11] We agree with the district judge that, although Count III purported to state a claim with respect to Wolfson's sales of stock in corporations other than Continental, his allegations of damages relate only to his sales of Continental. In our view, the district court properly held that the alleged injuries flowed from Wolfson's criminal conviction and from his defense to four civil suits, all of which involved only his Continental sales. In view of the fact that the Continental sales appear to be the lynchpin of Wolfson's injuries, and the fact that Wolfson was afforded an adequate opportunity to clarify the connection between his alleged injuries and his sales of stocks in corporations other than Continental,[12] we think the district

[11] The district court dismissed Count III because (1) Wolfson was barred from recovery with respect to his transactions in continental stock for the reasons justifying summary judgment on Counts I and II; (2) Count III failed to allege any injuries directly relating to Wolfson's sales of stock in corporations other than continental; and (3) the state claim in Count III relied solely on pendant jurisdiction, and no federal claim remained. Our conclusions concerning collateral estoppel and the in pari delicto defense with respect to Counts I and II of the complaint support the district court's rationale for dismissing the portion of Count III which alleged injuries from transactions in Continental stock. Wolfson does not allege error with respect to the dismissal of his state claim. His contention with respect to Count III concerns only his sales of stock in corporations other than Continental.

[12] The record reveals that the Appellees moved three times for a dismissal or, in the alternative, for summary judgment or a more definite statement. Each motion argued that Wolfson had failed to allege any injuries flowing from his sale of stock in corporations other than

court properly concluded that Wolfson alleged no injuries with respect to shares of stock in corporations other than continental. Therefore, since Wolfson could prove no set of facts entitling him to relief, the district court properly dismissed Count III of the complaint.

Discovery

[6] Wolfson's fourth contention is that he was improperly denied discovery. He argues that if discovery had been allowed, he would have been able to uncover information sufficient to preclude the invocation of collateral estoppel, at least at the summary judgment stage. We find no merit in Wolfson's contention. Because we held above that the district court properly invoked the doctrine of collateral estoppel even if Wolfson's allegations of perjury and withholding of material exculpatory evidence are true, we fail to see how discovery could have aided Wolfson in any way. Therefore, even assuming *arguendo* that the district court erred in limiting discovery, that error does not provide a ground for reversal. *See, e.g., Simmons v. Amerada Hess Corp.*, 619 F.2d 440 (5th Cir., 1980).

Finding no reversible error, we affirm the judgment of the district court.

AFFIRMED.

Continental. Though Wolfson amended his complaint three times, he made no attempt to clarify the connection between his injuries and his sales of stock in corporations other than Continental.

No. 80-1105

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

LOUIS E. WOLFSON,

Petitioner-Appellant,

–vs–

JOHN D. BAKER, JR., etc., et al.,

Respondents-Appellees.

On Writ of Certiorari to
the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS M. BAUMER, *Esquire*
Post Office Box 4099
Jacksonville, Florida 32201
(904) 354-1100

Attorney for Respondents

QUESTION PRESENTED:

Has the United States Court of Appeals for the Fifth Circuit denied Wolfson due process of law in affirming an alternative holding of the United States District Court for the Middle District of Florida granting Reynolds' motion for summary judgment because the doctrines of collateral estoppel and *in pari delicto* barred Wolfson from recovering damages against Reynolds in this action since Wolfson knew about the registration requirement he claimed Reynolds failed to advise him about, as necessarily had been determined by the jury during Wolfson's prior criminal conviction for violating the federal securities laws and during the affirmance on appeal of that conviction, and when Wolfson's due process claim is based solely on his filing of a separate petition for writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of the denial of his second writ of error *coram nobis* collaterally attacking the validity of his affirmed criminal conviction?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Appendices	iii
Table of Authorities	iv
Grounds on Which Jurisdiction is Opposed	v
Supreme Court Rules	v
Statement of the Case	1
Summary of Argument	3
Argument	4
Conclusion	6

APPENDICES

Page

APPENDIX "A"

United States v. Wolfson, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. July 26, 1976). 1a

APPENDIX "B"

United States v. Wolfson, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. February 20, 1980). 1b

Table of Authorities

Cases:	Pages:
In Re Wolfson, 453 F. Supp. 1087 (S.D.N.Y. 1978) . . .	3
United States v. Wolfson, 297 F. Supp. 881 (S.D.N.Y. 1968)	2
United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969)	1
United States v. Wolfson, 413 F.2d 804 (2d Cir. 1969).	2
United States v. Wolfson, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. July 26, 1976)	2, App. "A"
United States v. Wolfson, 558 F.2d 59 (2d Cir. 1977) . .	2
United States v. Wolfson, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. Feb. 20, 1980)	3, App. "B"
Wolfson v. Baker, 444 F. Supp. 1124 (M.D. Fla. 1978)	1, 2
Wolfson v. Baker, 623 F.2d 1074 (5th Cir. 1978), *reh. denied*, Oct. 6, 1980	3

Statutes:	
Securities Act of 1933, Section 5, 15 U.S.C. § 77e	1

Rules:	
Supreme Court Rule 17.1(a) (1980)	v, 5
Supreme Court Rule 21.5 (1980)	v, 6

GROUNDS ON WHICH JURISDICTION IS OPPOSED

Petitioner has failed to demonstrate that special and important reasons for granting certiorari as set forth in Rule 17.1(a) of this Court are present in this case.

SUPREME COURT RULES

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Rule 21

THE PETITION FOR CERTIORARI

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

No. 80-1105

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

LOUIS E. WOLFSON,

Petitioner-Appellant,

–VS–

JOHN D. BAKER, JR., etc., et al.,

Respondents-Appellees.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

On September 29, 1967, long before the instant civil action began, Wolfson was criminally convicted in a jury trial in the United States District Court for the Southern District of New York for failing to register certain stock sales in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e. *Wolfson v. Baker*, 444 Supp. 1124, 1127 (M.D. Fla. 1978). This conviction was affirmed on December 27, 1968. *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

Before the appeal of his conviction was completed, Wolfson moved for a new trial on the basis of newly discovered evidence. On December 2, 1968, after a lengthy evidentiary hear-

ing, Judge Palmieri, who had presided over Wolfson's original trial, denied the motion. *United States v. Wolfson*, 297 F. Supp. 881 (S.D.N.Y. 1968). Judge Palmieri's ruling was affirmed on July 1, 1969. *United States v. Wolfson*, 413 F.2d 804 (2d Cir. 1969). No petition for writ of certiorari was filed following that appellate decision.

On December 17, 1970, Wolfson began this civil action by filing a one count complaint against defendants in the United States District Court for the Middle District of Florida. After several initial complaints were dismissed, Wolfson filed a third amended complaint on February 14, 1975. Wolfson's third amended complaint contained four counts seeking damages from defendants for their alleged failure to advise Wolfson of the registration requirement he had been convicted of violating. Defendants moved to dismiss or for a more definite statement of all four counts or, alternatively, for entry of a summary judgment.

On May 16, 1975, Wolfson filed his first petition for writ of error *coram nobis* to collaterally attack his criminal conviction. Judge Palmeri denied the petition on July 26, 1976. *United States v. Wolfson*, Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. July 26, 1976) (Appendix "A"). Judge Palmieri's order was affirmed on June 3, 1977. *United States v. Wolfson*, 558 F.2d 59 (2d Cir. 1977). No petition for writ of certiorari was filed following that appellate decision.

On January 20, 1978, Judge Melton of the United States District Court for the Middle District of Florida rendered his decision in the instant civil action. Judge Melton granted defendants' motion for summary judgment as to Counts I and II of the complaint, and dismissed Counts III and IV with prejudice. *Wolfson v. Baker*, 444 F. Supp. 1124, 1136-1138 (M.D. Fla. 1978). On August 14, 1978, Judge Melton's decision was

affirmed, with summary judgment being approved on the basis of the alternative holding which had applied the doctrines of collateral estoppel and *in pari delicto*. *Wolfson v. Baker,* 623 F.2d 1074, 1081-1082 (5th Cir. 1978), *reh. denied*, Oct. 6, 1980.

On February 28, 1980, Judge Gagliardi denied a second petition for a writ of error *coram nobis* which Wolfson had filed collaterally attacking his criminal conviction. *United States v. Wolfson,* Unpublished Memorandum Opinion, Dkt. No. 66 Crim. 720 (S.D.N.Y. Feb. 20, 1980) (Appendix "B"). This decision was affirmed on appeal from the bench in open court without written opinion on July 25, 1980, and on September 18, 1980, Wolfson's petitions for rehearing and for rehearing *en banc* were denied.

On December 17, 1980, Wolfson filed a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit in case number 80-998 to challenge the affirmance of Judge Gagliardi's denial of his second petition for a writ of error *coram nobis*. Wolfson filed the instant petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on January 2, 1981.[1]

SUMMARY OF ARGUMENT

The petition for writ of certiorari in this case should be denied because petitioner fails to cite even one case or principle with which the well reasoned opinion of the United States Court of Appeals for the Fifth Circuit conflicts. Petitioner's sole basis for claiming that he has been denied due process of law is his filing of a petition for writ of certiorari to re-

1 The foregoing recitation does not exhaustively list all of the opinions generated by Wolfson in litigation arising subsequent to his criminal conviction. *See also In re Wolfson*, 453 F. Supp. 1087 (S.D.N.Y. 1978) (motion for recusal denied; motion for leave to take depositions denied; motion for disclosure of grand jury testimony granted).

view the affirmance of the denial of his second writ of error *coram nobis* collaterally attacking the prior criminal conviction and affirmance, which conviction is the foundation for the application of the doctrines of collateral estoppel and *in pari delicto* in this case. However, petitioner's repeated discretionary collateral attacks do not alter the issues actually litigated during his criminal conviction, and the application of the foregoing doctrines in this case was entirely correct.

ARGUMENT

Wolfson's sole reason for petitioning this Court in this case is the "pendency" of his petition urging this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit regarding the denial of his second petition for a writ of error *coram nobis* collaterally attacking the validity of his criminal conviction. Wolfson argues that the pendency of that petition for writ of certiorari invalidates the district court's and the Fifth Circuit's application of the doctrines of collateral estoppel and *in pari delicto*. Wolfson asserts that because he has filed a petition for writ of certiorari seeking review of the denial of his second petition for writ of error *coram nobis*, the instant petition for certiorari should be granted because the Fifth Circuit Court of Appeals in some unarticulated manner has denied him due process of law by "indulging the assumption" that he has had a full and fair opportunity to "litigate the knowledge issue in the trial itself or the subsequent *coram nobis* proceedings which have not yet been completed." To the contrary, however, the Fifth Circuit has indulged no assumption whatsoever, as the knowledge issue *was* exhaustively litigated. The Fifth Circuit's decision was entirely justified and correct and provides no basis for the current petition.

There is a fundamental flaw in Wolfson's logic. The pendency of Wolfson's *coram nobis* proceedings in New York has

nothing whatsoever to do with the validity of the Fifth Circuit's holding that the district court correctly ruled that the doctrines of collateral estoppel and *in pari delicto* bar Wolfson from recovering against defendants in the instant civil action since it necessarily was determined by the jury verdict in Wolfson's criminal conviction that Wolfson had actual knowledge of the registration requirements of the securities laws. If Wolfson's position was correct and carried to its logical conclusion, collateral estoppel could never apply in a civil action which followed the determination of an issue in a criminal conviction, since petitions for writs of error *coram nobis* collaterally attacking criminal convictions, being purely discretionary, may be filed long after sentences have been served, year after year, for any or for no reason whatsoever. *See* fn. 4 of Judge Gagliardi's opinion at pp. 9b-11b, Appendix B., *infra*. That such petitions may repeatedly be filed does not alter the issues that actually were litigated and decided in the conviction they attack.

It is perhaps because Wolfson's contention is so far-fetched that Wolfson cites no authority whatsoever in support of it. Nor does Wolfson comply with this Court's Rule 17.1(a) by demonstrating where the well reasoned decision of the Fifth Circuit Court of Appeals — or even a single case therein cited — is in conflict with another appellate decision. Wolfson thus flagrantly disregards the well established "conflicts" considerations governing review on certiorari set forth in that rule. However, because Wolfson cited Rule 17.1(a) in seeking to establish jurisdiction in this Court, Wolfson instead tries to invoke this Court's "power of supervision," yet he fails to cite even a single case or principle which indicates that the Fifth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court" as to justify the invocation. That Wolfson has so completely failed to present an accurate, brief

and clear presentation of arguments supported by persuasive legal authorities suffices for this Court to deny his petition under Rule 21.5 (1980).

CONCLUSION

For all of the foregoing reasons, Wolfson's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

THOMAS M. BAUMER

THOMAS M. BAUMER
P.O. Box 4099
Jacksonville, Florida 32201
(904) 354-1100

Attorney for Respondents

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - -X

UNITED STATES OF AMERICA
against
LOUIS E. WOLFSON,
Defendant

66 Cr. 720
(ELP)

- - - - - - - - - - - - -X

APPEARANCES

FENSTERWALD & OHLHAUSEN, *ESQS.*
910 Sixteenth St., N.W.
Washington, D.C. 20006
Attorneys for Petitioner Wolfson

BERNARD FENSTERWALD, JR., *ESQ.*
Of Counsel

BASS & ULLMAN, *ESQS.*
747 Third Avenue
New York, N. Y. 10017
Co-Counsel for Petitioner

By: ROBERT ULLMAN, *ESQ.*

ROBERT B. FISKE, JR., *ESQ.*
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N. Y. 10007

ANGUS MACBETH, *ESQ.*
Assistant United States Attorney
Of Counsel

PALMIERI, J.

This is a voluminous petition to set aside the judgment of conviction of Louis E. Wolfson entered on November 28, 1967, after a jury found him guilty, on September 29, 1967, of violating and conspiring to violate the federal securities laws. *United States v. Wolfson*, 66 Cr. 720 (the Continental Enterprises case). The conviction was affirmed. *United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), and certiorari denied, 394 U.S. 946 (1969). A motion for a new trial on grounds of newly discovered evidence was made on October 9, 1968. Following a lengthy evidentiary hearing, the motion was denied, 297 F. Supp. 881 (S.D.N.Y. 1969), and the denial was affirmed by the Second Circuit, 413 F.2d 804 (1969).

The petitioner was indicted, tried and convicted on other charges, *United States v. Wolfson*, 66 Cr. 832 (the Merritt-Chapman & Scott case), but the conviction was reversed by a divided court, 437 F.2d 862 (2d Cir. 1970), and subsequent trials of the petitioner resulted in jury disagreements and eventually in a nolle prosequi.

The Procedural Status of the Petition

Due to the complexity of the proceedings had and the multiplicity of the papers involved on this petition, it will clarify matters to trace briefly the activities that have occurred since the filing of this petition.

Contrary to the local rules of this court, the petitioner sought unsuccessfully to place this petition, filed May 16, 1975, before the Chief Judge of this court, or a judge other than the trial judge. He addressed it specifically to the Chief Judge, who refused to accept it, and then attempted to have it put on the court's motions calendar in Part I. Having failed in this maneuver, the petitioner filed on June 18, 1975, a motion for recusal of this Court. This motion was

denied in an opinion dated July 23, 1975, on substantive grounds as well as on the procedural grounds that the affidavit by petitioner and the certificate by his counsel, as required by 28 U.S.C. § 144, were not supplied.

By letter dated July 24, 1975, the Court gave certain directions to petitioner's counsel. The letter noted that the petition papers gave an impression of lack of familiarity with the record in this case and thus vastly complicated the burden on the United States Attorney and on the Court. Petitioner's counsel was asked to submit an affidavit stating that he had made a conscientious study of all relevant documents referred to in the petition, identifying which of the petition's points had and which had not been previously litigated, and noting which points related to the Continental Enterprises case and which to the Merritt-Chapman case. The purpose of these directions was to bring within a manageable compass petitioner's wide-ranging and partially repetitive allegations.

On August 21, 1975, petitioner filed a motion for reconsideration of the motion for recusal. In the papers submitted therewith, the petitioner indicated his intent to ignore the directions contained in the Court's letter of July 24, cavalierly disposing of the errors in the petition by stating that "they will be pointed out by the Government and taken into account by the Court."

The Court, in an opinion dated September 16, 1975, granted the request for reconsideration and denied the motion both on substantive grounds and for failure to remedy the procedural deficiencies. The Court reiterated its directions and stated its intent to dismiss the petition if counsel refused to comply.

On November 7, 1975, the petitioner's counsel filed an affidavit stating he had made a review of some of the

documents but that he could not comply with the directions fully, alleging that the court's records were in shambles. Although the Court had pointed out in one of its interim opinions that there was no conviction or judgment in the Merritt-Chapman case and that a *coram nobis* petition could not be properly availed of in that proceeding,[1] the attorney for the petitioner stated that, notwithstanding the Court's directions, he did "not find it feasible to assign most 'points' to either the Continental case (66 Cr. 720) or the Merritt-Chapman Scott case (66 Cr. 832) exclusively as most 'points' apply in one degree or another to both cases."

The Government answered this affidavit on January 12, 1976, and the petitioner replied to the Government's answer on February 6, 1976.

On February 9, 1976, the Court filed an opinion directing the petitioner's counsel to comply with its prior order and to submit information as to which documents in the court's records he claimed were missing or unavailable. The purpose of the latter directive was to clarify what documents, if any, were missing or unavailable, to help locate them, and to clear the petition of collateral issues.

On March 8, 1976, petitioner's counsel sent the Court a letter which indicated that he did not intend to comply with the Court's outstanding directives. Consequently, the Court, on March 22, 1976, noting this, ordered the Government to submit its answer on the merits of the petition so that the Court could proceed to a disposition of the matter.[2]

---

[1] The petition was filed in the Continental case only, Docket No. 66 Cr. 720.

[2]Since this order took the form of a letter to all counsel and reference is made in it to petitioner's counsel's letter of March 8, 1976, a word of explanation is necessary. The first paragraph of this letter referred to "a transcript of the February 19 meeting in chambers." This meeting was necessitated by the circulation of a scurrilous letter by the petitioner,

Thereafter, on April 8, 1976, the petitioner's counsel sent the Court a letter that can only be described as inflammatory and which indicates a tendency to misstate or selectively overlook facts of record. For example, the letter upbraided the Court for not having required the Government to answer the petition when just such an order had been entered the previous month.

By this letter, counsel also sought to move for an order permitting interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Counsel was informed that this should be done by formal motion in accordance with the rules of the court.

The Government filed its answer together with affidavits by Paul R. Grand and Paul B. Galvani on April 20, 1976. The petitioner then requested and was granted permission to reply to the Government, which he did on May 10, 1975. The Government then requested an opportunity to submit a supplemental answer. The Court reluctantly granted this request because the petitioner had used the opportunity for reply to inject new matters into the proceeding and to make new factual allegations. The Government's supplemental

---

while the petition was *sub judice*, covering about 27 printed pages in which he accused the trial court of conducting "kangaroo" proceedings, of having shown favoritism to highly publicized criminals and mafia figures, and of having engaged in numerous other misdeeds. He also accused the prosecutor and an official of the S.E.C., as well as the trial court, of participating in a "scheme to frame" him and of "railroading" him, adding that he could fully document his charges, inviting a lawsuit if he could not prove them, and asserting his financial responsibility and lack of immunity. This letter has been placed under seal and made part of the record in these proceedings. At the February 19th meeting petitioner's counsel declined to concede that this letter was either libelous or scurrilous. The letter, addressed to the Editor of the New York Times, was circulated to two other New York daily newspapers, and to a number of persons occupying positions of importance in the legal profession and in Government.

answer was filed on June 1, 1976, together with affidavits by Michael F. Armstrong, Angus Macbeth, William A. McRitchie and Robert M. Morgenthau.

The Petition Should be Dismissed for Failure to Follow the Court's Directions

Apart from anything else that might be said hereafter, petitioner's counsel has acted in flagrant disregard of the Court's directions, has chosen to proceed as if many of his charges had never been litigated, has made scattershot and broadside attacks on two criminal proceedings although only one of them ended in a judgment of conviction and has any pertinence to this petition. He has shirked his responsibility for clear and precise argument, has sought to place the burden of identifying and correcting his misstatements on the Court and the United States Attorney. Because of the disregard of this Court's directions, this Court concludes that there is sufficient basis to deny the petition with prejudice. Rule 41(b), Fed. R. Civ. P. *See Harris v. Nelson*, 394 U.S. 286, 299 (1969); 28 U.S.C. § 1651.

However, notwithstanding this conclusion the Court hereinafter discusses the petitioner's allegations in order to demonstrate that there are additional and persuasive grounds for the denial of the petition.

The Motion for Recusal

The opinions and orders of July 23, 1975, and September 16, 1975, disposed, among other matters, of the petitioner's motion for recusal of this Court. All that can be said that is relevant to this issue has been set forth in these two opinions and the matter need not be discussed again here, except to say that this Court reaffirms in every respect all that was there set forth. It should be noted that item (b) of petitioner's Motions for Discovery was satisfied by Appendix A to the opinion of July 23, 1975. The same opinion disposed of item (g) of the Motions for Discovery.

The Standards Governing a Petition for a Writ of Error Coram Nobis

At the outset, a review of the legal standards which apply to a petition for a writ of error *coram nobis*, and thus to all of petitioner's points and allegations, is in order. This is done so that it will not be necessary to restate and apply these standards to each of the numerous issues petitioner raises.

The writ of error *coram nobis* is an extraordinary remedy to be applied only under the most compelling circumstances to correct errors of the most fundamental character. *United States v. Morgan*, 346 U.S. 502, 512 (1954); *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963); *United States v. Malinsky*, 310 F. Supp. 523, 524 (S.D.N.Y. 1970).

> Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice.

United States v. Morgan, supra, 346 U.S. at 511.

In considering such a writ, a presumption of regularity attaches to the challenged proceedings and the burden of overcoming that presumption is placed on the petitioner. *United States v. Morgan, supra*, 346 U.S. at 512; *Bruno v. United States*, 474 F.2d 1261, 1263 (8th Cir. 1973); *Ybarra v. United States*, 461 F.2d 1195, 1198 (9th Cir. 1972); *United States v. Cariola, supra*, 323 F.2d at 184.

The function of the writ is to correct mistakes of fact not law. *Bronson v. Schulten*, 104 U.S. 410 (1881). Even then, the mistakes of fact must not be attributable to the negligence of the petitioner and must be of such a fundamental character as to render the proceeding itself irregular and invalid. *United States v. Morgan, supra*, 346 U.S. at 507; *United States v. Mayer*, 235 U.S. 55, 68 (1914); *Moon v.*

United States, 272 F.2d 530, 532 (D.C. Cir. 1959). The purpose of the writ is "to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment." *Allen v. United States,* 162 F.2d 193, 194 (6th Cir. 1947).

Issues that have already been adjudicated upon trial or appeal may not be raised in a collateral attack, whether that attack be a *coram nobis* petition, *Murgia v. United States,* 448 F.2d 1275, 1276 (9th Cir. 1971), *Jackson v. United States,* 394 F.2d 114, 115 (5th Cir. 1968), or a petition under 28 U.S.C. § 2255 which is the modern equivalent of a *coram nobis* petition, *Meyers v. United States,* 446 F.2d 37 (2d Cir. 1971); *United States v. Thompson,* 261 F.2d 809, 810 (2d Cir. 1958). As a necessary corollary to this rule, it is also clear that issues plainly available for consideration at trial or on appeal may not be raised. *Williams v. United States,* 463 F.2d 1183, 1184 (2d Cir. 1972), *aff'g,* 334 F. Supp. 669, 671 (S.D.N.Y. 1971), *cert. denied,* 409 U.S. 967 (1972).

Petitioner is entitled to an evidentiary hearing only if he alleges facts that would support a claim of constitutional dimensions, *Smith v. O'Grady,* 312 U.S. 329 (1941) and puts some material issue of fact into dispute. *Walker v. Johnston,* 312 U.S. 275, 284-85 (1941): *United States v. Carlino,* 400 F.2d 56, 58 (2d Cir. 1968), *cert. denied,* 394 U.S. 1013 (1969); *United States v. Tribote,* 297 F.2d 598, 600 (2d Cir. 1961). The Court is not obliged to accept as facts mere conclusory allegations asserted by the petitioner or his counsel. *Accardi v. United States,* 379 F.2d 312, 313 (2d Cir. 1967); *United States v. Tribote, supra,* 297 F.2d at 601.

Wolfson's petition has failed to meet these standards.

The Issues Already Litigated

Petitioner's counsel has conceded that a number of issues have already been litigated and therefore can form no valid

part of the basis for this petition. The Government is quite correct, therefore, in ruling out of these proceedings the following issues: a) alleged intimidation of witness Henry Steger; b) alleged discriminatory prosecution; c) change of venue; and d) alleged judicial bias and prejudice.

The "Slight Acquaintance" of the Foreman of the Grand Jury with the Trial Judge

The petitioner states that the foreman of the grand jury which indicted him has stated that he had a "slight acquaintance" with this Court. This Court has specifically denied any recollection of this grand juror or of any evidence of any connection with him in its opinion of July 23, 1975. There is no demonstration of the factual basis upon which this statement is based. Petitioner has been unable to obtain an affidavit from the foreman and apparently is no longer pressing this point. In his affidavit dated September 15, 1975, petitioner's counsel describes a meeting with the foreman but does not mention this issue. The foreman, in his affidavit submited by the Government, does not mention it.

Even if it were true that the foreman had a "slight acquaintance" with this Court, that would not entitle Wolfson to any relief. This Court did not empanel the grand jury or select its foreman. See Opinion of July 23, 1975, at 4. Wolfson's "fascinating questions" are so baseless and farfetched as not to warrant comment much less an evidentiary hearing.

Allegations Regarding the Grand Jury

In addition to petitioner's allegations concerning the trial court's role in the grand jury proceedings, which was shown to be nonexistent in prior opinions, petitioner raises a number of other issues concerning the grand jury. These include the selection of the foreman, the relationship of the foreman

to the United States Attorney, and to the Government's trial counsel, and the voting of a true bill.

As to petitioner's question whether the indictment was actually voted upon by the grand jury, the grand jury record book for the August 9, 1966 Special Grand Jury shows that the true bill in this case was voted on September 19, 1966, at which time 19 grand jurors were present and voted unanimously in favor of this true bill. In addition, attacks on an indictment and the institution of prosecution must be raised before trial. Rule 12(b)(1) and (2), Fed. R. Crim. P. Petitioner attacked the grand jury at the proper time but did not raise this issue. It is foreclosed to him now.

Petitioner's claims regarding foreman McRitchie require somewhat more comment. Apparently McRitchie knew Michael Armstrong, the Assistant United States Attorney in charge of presenting this case to the grand jury, and Robert M. Morgenthau, the United States Attorney at that time. Petitioner claims that McRitchie "admitted" knowing Morgenthau "well" and Armstrong "intimately." Petitioner further claims that:

> McRitchie has said that he was "concerned" when Michael Armstrong walked in the jury room to present the Wolfson cases. His concern led him to go hurriedly to see his friend, Morgenthau, to whom he explained the situation. According to McRitchie, Morgenthau said that he did not think his intimate friendship with prosecutor Armstrong was "justification for my being relieved."

Petitioner does not say when, where or to whom McRitchie made this "post-trial admission." The only support petitioner offers for his version of this matter is an affidavit by his counsel dated September 15, 1975. In the affidavit, counsel says he visited McRitchie who "acknowledged that he had been a life-long and intimate friend of Michael Armstrong" and said that, because he thought the situation might be

improper, "he went to his friend, Robert Morgenthau" who "assured him that it was 'alright.'"

Petitioner's counsel makes much of what he terms the "life-long and intimate" friendship between McRitchie and Armstrong but said he had "no way to force Mr. McRitchie to confirm this by way of affidavit." In point of fact McRitchie denied such a relationship. Additionally, Mr. McRitchie resisted the thinly veiled threat of public embarrassment made by petitioner's counsel.[3]

The petitioner's and his counsel's views of the matter are in contrast to statements in the affidavits of McRitchie, Armstrong and Morgenthau submitted by the Government.[4]

Morgenthau recalls meeting McRitchie two or three times with Morgenthau's father at the bank where McRitchie worked and then, after the sitting of the grand jury in question, several times as trustee on matters involving his father's estate. He states: "This was a business relationship, and I was not a personal or social friend of McRitchie." He further states that, apart from telling Armstrong that he thought it was proper for McRitchie to serve on the grand jury, he "had no conversation with or about McRitchie concerning any grand jury matter," and did not personally appear before the grand jury in question.

---

[3]See the letter of petitioner's counsel to McRitchie, dated July 9, 1974, attached to McRitchie's affidavit.

[4]These three affidavits, plus the affidavit of Assistant United States Attorney Angus Macbeth, answer the questions posed by petitioner as a basis for items (a) and (c) of his Motions for Discovery. Therefore, those requests for discovery are denied. Moreover, petitioner's request for the entire grand jury minutes, as most of his other requests, is a dragnet spread to gather information to add to the irrelevant and immaterial matter that already bloats his papers. Petitioner has not justified any discovery at this late stage regarding his fiercely contested and thoroughly litigated conviction, particularly since he admits that he has not raised a single issue that rises to the constitutional significance necessary for relief.

Armstrong says that McRitchie's son and he were classmates during the last few years of grade school and through high school. They were "close friends" in the fourth or fifth grades of grammar school and they thereafter saw less of each other and "grew to have different circles of friends." He states that "almost all" of his occasional contacts with McRitchie were during grade school and "all of them were in passing." Between graduation from high school in 1950 and the time the grand jury was convened, Armstrong says he may have seen McRitchie "briefly on, at most, two or three occasions."

McRitchie's affidavit confirms in detail Morgenthau's and Armstrong's descriptions of their relationships to him. He states that his "relationship to [Morgenthau] was a business one rather than one of personal friendship," and that "[i]t is inaccurate to describe Armstrong as 'a life-long and intimate friend of mine.'"

McRitchie also states that he was visited by investigators on November 9, 1970, and again on July 2, 1974, regarding his service on the grand jury in question. One or both of these visits presumably form the basis of what petitioner has set forth as McRitchie's "post-trial admission[s]." If McRitchie's statements during those visits were the same as the statements in his affidavit – the Court assumes this to be the case, having no reason to think otherwise – then they become very significant. They show the extent to which petitioner has gone in abstracting from the facts in order to make assertions in support of his position. He has started with a few basic facts and drawn therefrom conclusions which, although they are not inconsistent with these facts, find no direct support therein. The most obvious example is the inflation of the few casual meetings many years before between McRitchie and Armstrong into "a life-long and intimate friend[ship]." This tendency to hyperbole has

constrained the Court to subject all of petitioner's allegations to the utmost scrutiny.[5]

In any event, petitioner has made an insufficient showing to obtain relief on this issue. In the Second Circuit, one seeking to upset his conviction on the ground if impermissible bias of a grand juror must show actual prejudice, not mere speculation. *United States v. Remington*, 191 F.2d 246, 252 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952). On a *coram nobis* petition this showing must overcome the presumption of regularity in the proceedings of the court, as noted earlier.

Courts have consistently rejected challenges to the impartiality of grand jurors where direct proof of undue influence was lacking. *Castle v. United States*, 238 F.2d 131, 135-36 (8th Cir. 1956); *United States v. Remington, supra; United States v. Anzelmo*, 319 F. Supp. 1106, 1113-14 (E.D. La. 1970); *United States v. Brandt*, 139 F. Supp. 349 (N.D. Ohio 1955); *United States v. Fujimoto*, 102 F. Supp. 890 (D. Ha. 1952); *United States v. Smyth*, 104 F. Supp. 283 (N.D. Cal. 1952). Here, petitioner has presented no more than speculation that foreman McRitchie was improperly influenced by his prior associations with Armstrong and Morgenthau. No actual prejudice has been shown and McRitchie himself pointedly denies any prejudice, bias or undue influence.

Even if petitioner could show that McRitchie was biased, he would be entitled to no relief. "[T]he majority rule is that a defendant has no constitutional right to an impartial grand

---

[5]Following the procedure for a petition pursuant to 28 U.S.C. § 2255, the Court has not used the Government's affidavits as a basis for finding any of petitioner's allegations to the false, though it does rely on them in assessing the sufficiency of petitioner's and his counsel's affidavits. *United States v. Franzese*, 525 F.2d 27, 31 (2d Cir. 1975) and cases cited there.

jury." *United States v. Archer*, 355 F. Supp. 981, 988 (S.D.N.Y. 1972). *Accord, Gorin v. United States*, 313 F.2d 641, 645 (1st Cir. 1963), *cert. denied*, 379 U.S. 971 (1965); *United States v. Anzelmo, supra; United States v. Knowles*, 147 F. Supp. 19 (D.D.C. 1957); *United States v. Smyth, supra*. An indictment will stand as long as it was voted by 12 grand jurors after deducting those not legally qualified, Rule (6)(b)(2), Fed. R. Crim. P. Petitioner's claims do not warrant dismissal of the indictment here because this indictment was voted by 6 more grand jurors than the requisite 12 even if McRitchie is considered legally or otherwise disqualified. *United States ex rel. McCarin v. Thompson*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944) (L.Hand, J.). *Accord, Castle v. United States, supra; United States v. Anzelmo, supra; United States v. Fujimoto, supra*. This rule of law also forecloses petitioner's claims regarding McRitchie's selection to be on the grand jury.

Petitioner suggests that McRitchie's position as foreman afforded him influence of such magnitude that bias on his part would necessarily infect and invalidate the entire grand jury process. This contention must be rejected because there is no showing that McRitchie did exercise undue influence and no reason to believe that he may have, given his direct denial thereof. An indictment is merely an accusation. Since there stands between this accusation of petitioner and his subsequent conviction the unanimous finding beyond a reasonable doubt of a petit jury of 12, there is no reasonable basis for granting petitioner relief on this basis.

Nor is there a basis for an evidentiary hearing on this issue. The hearsay and assertions put into the record by petitioner and his counsel do not qualify as proper evidential material that might warrant a hearing. *D'Ercole v. United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 995 (1966). *See United States v. Franzese*, 525 F.2d 27 (2d

Cir. 1975). See also the authorities cited earlier in this opinion. Given the extensive effort of petitioner to obtain evidence on this issue, as revealed by the McRitchie affidavit and the attachment thereto, one may assume he has put forth all material evidence in his possession. Not only is this Court convinced that petitioner could not prove the allegations he has made on this issue, but, taken as true, they are insufficient as a matter of law to warrant the relief he seeks.

The Alleged Threats to George B. Green

Here a stockbroker who was a grand jury witness is alleged to have been threatened by two United States Attorneys, Michael Armstrong and Paul Galvani. The alleged incident involving Mr. Galvani took place in 1968, after the conviction here sought to be vacated, and involved the *Merritt-Chapman* case which has no relevance to this proceeding. The incident allegedly involving Mr. Armstrong was nothing more than a reminder to a prospective grand jury witness that he faced the penalties for perjury if he lied. Not only is there no showing of a threat, Green, in his affidavit, Exhibit VI(A), gives no indication, nor is there any other evidence, that Green's testimony was in any way impaired or affected. Additionally, there is nothing to indicate that Green was not available to Wolfson as a witness at the trial.

Petitioner's Attack Upon His Trial Counsel

Petitioner claims his counsel, Mr. Gould and Mr. Glickstein, were either grossly negligent or disloyal "or some of each." He states the test for gross negligence to be "ineptitude . . . so extensive that the entire proceedings were a farce and a mockery of justice . . ." citing, *inter alia, United States ex rel. Boucher v. Reinke,* 341 F.2d 977 (2d Cir. 1965) and *United States v. Wight,* 176 F.2d 376 (2d Cir. 1949).

He further states that the sixth amendment right to effective assistance of counsel has been denied due to disloyalty or conflict of interest on the part of counsel only when "the circumstances . . . demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client, *Robinson v. United States*, 448 F.2d 1255 (8th Cir. 1971)."

Petitioner attempts to show ineffective assistance of counsel by complaining of various decisions before and at trial, including the decisions not to devote more time to the study of corporate files, not to attempt to interview a witness, not to make a Rule 16 motion, not to introduce various pieces of evidence and not to have a grand jury witness assert the attorney-client privilege. The Court has reviewed each of these issues and finds that each of the decisions, far from demonstrating gross negligence, was well within the range of competence demanded of attorneys in criminal cases. The facts here bear no resemblance to those in the case cited by petitioner, *Ray v. Rose*, 491 F.2d 285 (6th Cir. 1974). The attack petitioner makes upon his counsel is tantamount to a hindsight reappraisal of his defense and the preparation for it. A *coram nobis* petition will not lie to review the tactics complained of here. *See Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951); *Lampe v. United States*, 288 F.2d 881, 882 (D.C. Cir. 1961) (en banc).

To demonstrate that his counsel were disloyal, petitioner alleges his belief that they were "threatened with prosecution" in various matters involving the SEC. The implication, never stated, was that his counsel allowed the United States Attorney and the SEC to convict petitioner in exchange for their own freedom from prosecution. The proof offered is twofold. The first is the fact that neither counsel was indicted although Glickstein was an unindicted co-conspirator in the later Merritt-Chapman case and petitioner

believes there was a "criminal reference report" which recommended prosecution of Mr. Gould in connection with the Canadian Javelin case. The second is a speech-article by Dean Monroe Freedman of Hofstra School of Law, one proposition of which is that the New York securities bar is overly compliant to SEC wishes.

Petitioner further alleges that his trial attorney, and two partners, had proprietary interests in a New York stock exchange firm in the sixties, possibly while Mr. Gould represented petitioner. Petitioner's theory here apparently is that interest in such a firm, "very closely regulated by the S.E.C.," would necessarily taint Mr. Gould's representation of petitioner in a securities trial. This is a patently insufficient claim of conflict of interest.

Even if, contrary to the findings made above, the counsel's actions complained of had been of a nature to suggest ineffective representation, the evidence presented (assuming there was a criminal reference report) is far too paltry to warrant the gigantic leap from less-than-perfect representation to the affirmative deliverance (deliberate or otherwise) of petitioner into the hands of the prosecutor for personal reasons. The Court cannot let itself be carried this far by petitioner's suspicions and fears. Petitioner was well served at trial by Mr. Gould, a distinguished member of the New York bar, and Mr. Glickstein of Jacksonville, Florida, petitioner's old friend and associate who acted as his house counsel and was one of his witnesses at trial. His attack on their representation of him does not approach a showing of "deliberate abdication of [their] ethical duty to [their] client."

Since it reaches this conclusion, the Court declines to grant items (d), (e) and (f) of petitioner's Motions for Discovery.

The Alleged Conflicts of Interest of Paul Grand and Arthur Liman

The petition makes the utterly unfounded statement that Mr. Grand was "one of the prosecutors in the Continental case." Mr. Grand's affidavit demonstrates that he played no role in the trial or appeal of the Continental case. He became chief trial counsel for the Government in the Merritt-Chapman case, which has no relevance to this petition, in February 1968, approximately a year and a half after petitioner's indictment in both cases and approximately 5 months after the jury found petitioner guilty in the Continental case. His only role in the Continental case was to represent the Government on the petitioner's motion for a new trial in October 1968, over a year after petitioner's conviction.

The conflict of Mr. Grand is predicated on an alleged relationship between petitioner's co-defendant Gerbert and Mr. Grand's father, from 1955 to 1957, while both were directors of a corporation in St. Louis, Missouri. Mr. Gerbert says the relationship was marked by "continuous disagreements" culminating in "a very heated argument," Mr. Grand *pere's* forced removal from the board, and "much bitterness all around." Mr. Grand *fils* states that he was away from home in the Army and law school during this period and his "knowledge of the business relationship between Mr. Gerbert and my father has always been almost non-existent." On these facts this Court must conclude that this conflict is not only unrelated to this petition but is also too nebulous, absent a showing of harm, to warrant relief in any case. This is another instance of petitioner's attempts to lump the two prosecutions together despite the repeated orders of this Court.

Mr. Liman acted as attorney for a co-defendant in the Merritt-Chapman case. He had nothing to do with the

Continental Enterprises case. What has already been said with respect to the attack on Mr. Grand applies equally here.

The Alleged Conflict of Interest of Paul Galvani

Mr. Galvani, now a member of a Boston law firm, served at one time as law clerk to the trial court. He subsequently served as an Assistant United States Attorney between 1966 and 1970. He took no part in the Continental Enterprises case except with respect to certain pretrial motions which were heard and decided many months before trial. He was later to serve as a deputy to Mr. Grand in the Merritt-Chapman case. His relationship to the trial court was raised and summarily rejected as a ground for recusal by the Court of Appeals in *Wolfson v. Palmieri*, 396 F.2d 121, 123 (2d Cir. 1968). Here again the petitioner seeks to relitigate an issue already decided against him.

The Alleged Perjury of Allen and Morley

The petitioner attacks as perjurious the testimony of two Government witnesses, John Morley and Stuart Allen. Both claims are insubstantial.

The heart of petitioner's claim against Morley is that there are differences between Morley's testimony before the SEC in 1965 and his trail testimony and that Morley allegedly admitted to one Michael C. Holloway that he had lied before the SEC in order to support petitioner's co-defendant Gerbert. Before cross-examination of Morley, the defense was given the relevant parts of Morley's SEC testimony (Exhibit 3504A) and had sufficient opportunity to exploit any material differences between Morley's prior testimony and what he said at trial. Morley's testimony was also attacked unsuccessfully on appeal. Appellants' Brief, *United States v. Wolfson and Gerbert*, 2d Cir. Dkt. No. 31993 at 8-10; 49-50.

Petitioner is entitled to no relief on this claim. Since this matter was available for litigation at trial and on appeal, it may not be raised in this petition. Furthermore, there is no offer of proof that Morley perjured himself at trial as opposed to before the SEC. And finally, petitioner has not even attempted to show any harm to himself by Morley's allegedly perjured testimony before the SEC, which Morley is said to have labeled "a very minor thing."

Petitioner's claims relating to the excision of the 3500 material are foreclosed to him because they were available to him on appeal. Title 18 U.S.C. § 3500(c) provides a procedure for objection to and appeal from excision of material by the trial court:

> If, pursuant to such procedure [for the excision of 3500 material], any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

Petitioner's failure to avail himself of this procedure forecloses the matter to review by *coram nobis* petition.

Moreover, petitioner's excursion into the area of the 3500 material is a hollow issue. First, witness Duncan's testimony is not so easily discredited as petitioner would assume. Duncan testified that SEC lawyer Kelly met with petitioner Wolfson in 1950 and explained registration requirements to him. The fact that the meeting may have "related to 'manipulation" rather than the sale of unregistered stock – if indeed such a facile distinction can be made in this situation – is irrelevant if the meeting included this explanation of registration requirements as Duncan testified and Kelly's memorandum shows. Moreover, the SEC letter of January

11, 1951, attached to the affidavit of petitioner's counsel filed November 13, 1975, clearly shows that the Capital Transit matter involved "a secondary distribution of unregistered stock on behalf of controlling persons."

More importantly, the main thrust of this claim, as petitioner admits, relates to the "relative 'guilt' of Wolfson, the defendant, versus Morley, the prosecution witness." This is a contention that was unsuccessfully presented at trial. Petitioner appears unable or unwilling to grasp the fact that Morley's knowledge cannot exculpate the petitioner. The evidence and testimony objected to was presented to demonstrate that petitioner was aware of the registration requirements. Evidence that shows Morley to have had the same awareness proves nothing.

As with his other claims, petitioner's assertions on this issue show no error of constitutional dimensions and raise no factual dispute warranting an evidentiary hearing.

Allen, an employee of the SEC who did a great deal of work on the Continental Enterprises case, gave testimony before the grand jury with respect to interviews with the brokers at ten different brokerage houses through which Continental stock had been sold. The part of the interviews that Allen related focused on the brokers' description of their practices regarding compliance with SEC regulation of sales of unregistered stock by control persons. Petitioner claims that the testimony at trial of some of these brokers shows Allen to have been lying to, or at least wilfully misleading, the grand jury. Petitioner sets forth Allen's testimony regarding two of these brokers followed by the brokers' testimony at trial. These quotes, presumably the two examples most supportive of petitioner's position, do not even remotely suggest that Allen's testimony was either perjurious or wilfully misleading. Allen testified before the grand jury as to the general operating practices of the brokers as they recounted

them to him. At trial neither broker in any way denied those practices or that he had told Allen that those were his practices. The brokers' testimony indicates that they made only generalized inquiries to sellers of stock regarding control problems.

Petitioner's implication that Allen told the grand jury that the brokers had made extensive, detailed inquiry is unsupported by the transcript.

Allegation of Misleading the Jury

This issue had to be, and was, raised on direct appeal. See Appellants' Brief, *United States v. Wolfson and Gerbert,* 2d Cir. Dkt. No. 31993 at 15. Since petitioner has presented no new facts regarding this claim, it cannot be raised anew.

Allegations of an SEC "Enemies" List, Discriminatory Prosecution and Impermissible Prosecutorial Purpose

Even if an SEC "Enemies" list existed and petitioner's name was on it, the petitioner would not be entitled to relief. He has not shown that he was injured or prejudiced thereby other than to assert that "the very purpose of such lists was to harass and, where possible, jail those who were placed thereon, whether guilty of a crime or not." This unsupported assertion cannot warrant vacating a conviction by a unanimous jury verdict. And the occurrence of the concatenation of events collectively known as Watergate does not offset the fact that, as petitioner concedes, the issue of discriminatory prosecution has already been litigated.

The charge of impermissible prosecutorial purpose in this case is equally unsupported. The extensive account of petitioner's life, work and speeches proves nothing. He has conceded that the change of venue issue has been litigated.

And the third-hand hearsay statements that reportedly were made by officials of the Department of Justice all refer to the Merritt-Chapman case and are irrelevant here.

Conclusion

This petition presents a hodge-podge of matters relating to two criminal proceedings of which only one ended in a judgment of conviction. They are frequently repetitions of matters already litigated. They seek, in some instances, to raise issues that could have been availed of at trial or on appeal. In many instances, particularly where perjury and conflicts of interest are charged, the factual bases are lacking and the assertions of the petitioner are based upon conclusory allegations and innuendoes. Recognizing the weakness of his claims, petitioner has taken the stance that "his constitutional right to a fair trial was not denied by any one particular 'point,' but that the totality of the denials clearly adds up to a lack of due process under law." This Court does not accept the premise that legally insufficient allegations can be summed to total a claim sufficient to overturn at this late date a thoroughly contested and appealed jury verdict. Moreover, the petition, considered *in toto*, does not present "circumstances compelling [a grant of relief] to achieve justice." *United States v. Morgan, supra,* 346 U.S. at 511. For these reasons, and because of petitioner's failure to obey the repeated orders of the Court with respect to the submission of his contentions, this petition must be denied.

Petition denied in all respects. It is so ordered.

Dated: New York, N. Y.
July 26, 1976

Edward L. Palmieri

EDMUND L. PALMIERI
U. S. D. J.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -x

LOUIS E. WOLFSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- - - - - - - - - - - - - - - - -x

66 Civ. 720 (LPG) *

MEMORANDUM DECISION

GAGLIARDI, D.J.

Petitioner Louis Wolfson commenced this action seeking a writ of error *coram nobis* pursuant to 28 U.S.C. §1651, or alternatively an evidentiary hearing on the factual issues raised in the petition. Petitioner was convicted on September 28, 1967, after a jury trial before Hon. Edmund L. Palmieri and found guilty of violating the registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C. §77e ("Securities Act") in connection with the sale of stock of Continental Enterprises Inc. ("Continental"). *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. September 28, 1967), *aff'd*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

Since 1967, petitioner has persistently sought to set aside this judgment by a variety of post-conviction remedies. On

---

*** Judge Gagliardi's original opinion contains a typographical error incorrectly referring to the civil docket. The opinion, however, was filed in Wolfson's criminal case, and it is listed as a ciminal opinion throughout this brief in opposition.**

October 10, 1968, petitioner moved for a new trial on the ground of newly discovered evidence.[1] Judge Palmieri denied the motion. *United States v. Wolfson*, 297 F. Supp. 881 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804 (2d Cir. 1969). On May 16, 1975, having served his prison term and paid the fine imposed, petitioner filed his first petition for a writ of error *coram nobis*. The petition was denied by Judge Palmieri on both the merits and for petitioner's failure to follow the court's directions pursuant to Rule 41(b), Fed. R. Civ. P, *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976), *aff'd*, 558 F.2d 59 (2d Cir. 1977). In the instant petition, Wolfson alleges that newly discovered evidence, obtained under the Freedom of Information Act, as amended, 5 U.S.C. §552, and as a result of court orders, warrants the relief sought. For the reasons set forth below, the petition is denied.

I. Statements of Facts

Petitioner's conviction for violating Section 5 of the Securities Act required a finding that he acted knowingly. The government established this element of the offense in large part through the testimony of John J. Morley, Wolfson's stockbroker for over twenty years, and James Duncan, a former employee of the Securities and Exchange Commission ("S.E.C."). Duncan testified concerning a memorandum[2] that was prepared after Wolfson's appearance at the S.E.C. in 1950 in connection with an S.E.C. investigation of Capital Transit Company ("Capital"), a company that

---

[1] Petitioner challenged the authenticity of a memorandum introduced by the governemnt at trial and labeled Government Exhibit 21. Judge Palmieri denied the motion after an extensive evidentiary hearing. Petitioner raises a new challenge to the government's use of the memorandum in the instant petition, as discussed *infra*.

[2] This is the same memorandum referred to in note 1, *supra*.

Wolfson controlled in the early 1950's. Since petitioner's present claims relate in part to the Capital investigation, the events surrounding that investigation must first be reviewed.

a. Capital Investigation

In 1949, Wolfson, members of his family and close associates purchased a controlling interest in Capital. During 1950, the market value of the stock increased substantially, triggering an S.E.C. investigation. The official S.E.C. order, dated September 20, 1950, directed an investigation into sales of Capital stock by certain named individuals who were believed to be members of the control group of Capital. The order identified petitioner as a member of the control group although it did not name him specifically as a target of the investigation. On October 12, 1950, petitioner and an associate made an appointment to speak with E. Russel Kelly, the Regional Administrator of the S.E.C. The meeting was also attended by Duncan, an assistant supervisor of the S.E.C. After the meeting, Kelly prepared an eight page memorandum "to the file," stating, *inter alia*, that petitioner and his associate had learned about the investigation, and that they were both concerned about rumors, potentially damaging to the company, that the stock was manipulated or the market rigged. According to the memorandum, the two hour conversation included a discussion of section 5 registration requirements and definitions of "control persons." Although the Capital investigation uncovered violations of the Securities Act and the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.* ("Exchange Act"), the S.E.C. decided to take no official action against any of the persons involved. The S.E.C.'s investigation also focused on the practices of the broker-dealers through whom the Wolfson group had sold their shares of Capital stock. Following its decision not to prosecute, the S.E.C. sent letters of censure to the broker-dealers involved, including A. M. Kidder and Co. ("Kidder"),

requesting that they institute procedures to insure that there would be no future violations of Section 5.

b. Continental and Merritt-Chapman Investigations and Trial

In 1954, Continental was spun off from Capital, with Wolfson becoming its major shareholder. In 1962, Continental stock rose from $1 per share to $8 per share and thereafter dropped back to $1 per share. Prior to the decline, petitioner and an associate, Elkin B. Gerbert sold a substantial portion of their holdings. Between 1960-65, petitioner and members of his group were also trading in the stock of Merritt Chapman and Scott Corporation ("Merritt Chapman") in which they likewise held controlling interests. The S.E.C. commenced investigations into petitioner's activities in Continental and Merritt Chapman in 1965. Morley, a broker with Kidder and later with Reynolds and Co. ("Reynolds") after it acquired Kidder in 1963, was petitioner's principal stockbroker during this entire period. On October 18, 1965, in connection with the Merritt Chapman investigation, the S.E.C. examined Morley. Anthony Englese, in-house counsel for Reynolds, accompanied Morley and purported to represent him before the S.E.C. During the examination, which generated a 105 page transcript, Morley was questioned about his practices and those of his firms when trading in stock of Continental, Merritt Chapman and Capital. Inquiry was made into Morley's knowledge of the S.E.C. investigation of Capital trading in 1950-52. He was also asked whether or not he knew about a memorandum that Kidder circulated to its employees in 1950 setting forth the requirements for brokers' compliance with the Securities Act and demanding strict adherence to those requirements by Kidder employees.

On September 14, 1966, Joseph M. Glickstein, petitioner's attorney for many years, was scheduled to testify before the

grand jury in relation to the Merritt Chapman investigation. In order to avoid encroaching upon matters within the scope of the attorney-client privilege, the Assistant United States Attorney met with Glickstein in the presence of Milton Gould, Esq., who represented Wolfson in the Continental case, to discuss any problems relating to privileged issues that might arise. Glickstein was assured that no attempt would be made to invade privileged areas and that the government was seeking Glickstein's testimony only in connection with his attendance at Merritt Chapman executive committee meetings. Gould accompanied Glickstein to the grand jury.

Petitioner and Gerbert were indicted on September 19, 1966 for violating Section 5 of the Securities Act in connection with their sales of Continental stock. They were both convicted on all counts. The government called Morley as a witness at the trial to testify regarding procedures he and his firm followed in handling transactions for petitioner and his associates. Morley stated that he and his firm were very conscientious about adhering to the Securities Act's restrictions on sales by control persons, that the firm rejected those sales that would violate the prohibitions and explained the restrictions to petitioner and his affiliates. Following Morley's direct examination, the government made available to petitioner's counsel the transcript of Morley's S.E.C. interview, as required by 18 U.S.C. §3500. The government requested, however, that pages which in its view did not relate to the subject of Morley's testimony at trial be excised. Judge Palmieri granted the government's request, and concurred in its determination of the pages to be deleted, with one exception: he ruled that the government turn over the page on which Morley stated that Englese was representing him. The deleted pages of Morley's testimony made reference to the 1950-52 Capital investigation and the Kidder memorandum. Petitioner's counsel cross-examined Morley

extensively, pointing out inconsistencies in his testimony before the S.E.C. and at trial, as well as eliciting admissions of his non-compliance with the Securities Act. The prosecution questioned Wolfson about the meeting with Kelly in 1950. When Wolfson denied a recollection of the meeting, the government introduced as rebuttal evidence the memorandum prepared by Kelly. Duncan testified as to his recollection of the meeting after reading the memorandum which was also introduced into evidence.

Petitioner raised numerous claims of error on appeal from his conviction, including several relating to interpretation of the Securities Act sections which he and Gerbert were charged with violating. The Second Circuit considered and rejected these claims. In addition, petitioner objected to the prosecutor's summation to the jury. After discussing specific objections, the court stated, "without going into greater detail it will suffice to say that reading the prosecuting attorney's entire summation in conjunction with the court's charge discloses no reversible error." *United States v. Wolfson, supra,* 405 F.2d at 785. It appears that petitioner did not claim, as he was entitled to in accordance with 18 U.S.C. §3500(c), error in the district court's ruling that the government could withhold portions of Morley's S.E.C. testimony.

During the pendency of the appeal to the Second Circuit, Judge Palmieri denied petitioner's motion for a new trial based on a challenge to the authenticity of the Kelly memorandum. In connection with the motion, petitioner requested the S.E.C. files of the Capital investigation, labeled W525 and W557, from which the memorandum had been taken. Although Judge Palmieri denied this request, he ruled that petitioner was entitled to certain documents from these S.E.C. files. On appeal, petitioner claimed error in the district court's denial of his broader discovery motion. Rejecting petitioner's claims, the Second Circuit held that the

district court did not err in denying petitioner access to the complete files covering investigations W525 and W557. *United States v. Wolfson, supra,* 413 F.2d at 808.

Following his conviction in the Continental case, petitioner was indicted and tried for Exchange Act violations in connection with the purchase and sale of Merritt Chapman securities.[3] In the course of that 1968 trial, petitioner gained access to the excised pages of Morley's S.E.C. testimony.

c. First Coram Nobis Petition

On May 16, 1975, petitioner filed his first *coram nobis* petition, seeking to set aside his conviction in the Continental case. The petition raised a myriad of claims, all of which Judge Palmieri entertained and rejected. Included were claims which reappear in the instant petition, albeit in a different guise. Petitioner argued, in his first *coram nobis* petition, as he had in the motion for a new trial and on appeal from the denial of that motion, that the prosecutor wrongfully withheld the S.E.C. files containing potentially exculpatory material. Petitioner once more asserted prosecutorial misconduct in the summation. Specifically, petitioner stated that the prosecutor knew that Wolfson had not been a defendant or prospective defendant in the Capital investigation and yet had deliberately misled the jury into believing that he had avoided prosecution and that the jury "should not let it happen again." (Petition at 34). Petitioner also raised a broad claim of ineffective assistance of counsel citing many specific instances; one particular grievance related to Glickstein's grand jury appearance, and counsels'

---

[3] A divided Second Circuit reversed Wolfson's conviction in the Merritt Chapman case. *United States v. Wolfson,* 437 F.2d 862 (2d Cir. 1970). After two subsequent trials which resulted in hung juries, petitioner entered a plea of *nolo contendere* to one count and paid a fine imposed by the court.

failure to notify petitioner of the appearance in advance. A second grievance involved Gould, who petitioner claimed was the subject of a "criminal reference report" which recommended his prosecution for an unrelated matter. Petitioner further claimed that Morley's testimony at trial or before the S.E.C. was perjured, a fact which was known to the prosecutor. And finally, petitioner asserted that the prosecutor wrongfully excised material in violation of 18 U.S.C. §3500. Judge Palmieri denied petitioner relief on all claims. He rejected the claims of improperly withheld material as untimely, not having been raised on appeal in accordance with 13 U.S.C. §3500(c). *United States v. Wolfson, supra,* No. 66 Cr. 720 at 28. He ruled that the claim of Morley's perjury was insubstantial and further that it had previously been raised on appeal. *Id.* at 27. As to the claim of improper summation, he stated that it, too, had been raised and rejected on appeal. *Id.* at 31.

The Second Circuit affirmed the denial of the coram nobis petition. *United States v. Wolfson, supra,* 558 F.2d 59. Although petitioner initially raised three issues on appeal, he subsequently abandoned the claim asserting error in the withholding of Morley's S.E.C. testimony, see *United States v. Wolfson, supra,* 558 F.2d at 64,n.18. The Second Circuit examined and rejected the claims involving Glickstein and Gould. With reference to the assertion that Gould was a subject of investigation, the court stated that the petition "presented little, aside from [petitioner's] own speculations, in support of the claim." *United States v. Wolfson, supra,* 558 F.2d at 65. The court devoted considerable discussion to the alleged impropriety of Glickstein's grand jury appearance prior to petitioner's indictment by the same grand jury. The court concluded:

> Wolfson's counsel claimed to have invoked the attorney-client privilege where appropriate and there is nothing

> to indicate that this is not so. And even if there were a violation of the attorney-client privilege, appellant concedes that he is unable to find any case in which such a violation has resulted in dismissal of an indictment or even in a new trial.

Id. at 66.

d. Discovery Motions

Petitioner next filed three motions in the district court on November 10, 1977, seeking, *inter alia*, a court order pursuant to Rule 6(e) of Fed. R. Crim. P. permitting disclosure of the minutes of Glickstein's grand jury testimony. Judge Palmieri stated that any claims relating to Glickstein's appearance should have been raised on appeal from conviction. The court also stated that it had examined the minutes *in camera* and had concluded that the claim of improper representation would not be supported by anything which had occurred before the grand jury. In fact, the court stated "petitioner's rights were assiduously protected both by the Assistant United States Attorney and by the witness's invocation of the attorney-client privilege." *In re Wolfson*, M 23-7/77 (S.D.N.Y. June 15, 1978) at 16. Nevertheless the court issued an order directing that the transcript be made available for copying by petitioner, stating that its decision was "primarily motivated by the desire to dispel the atmosphere, however groundless, of suspicion and accusation which ha[d] prevailed for too long in this litigation." *Id.* at 17.[4]

---

[4] Judge Palmieri was the object of several recusal motions during the course of the thirteen years of Wolfson litigation in the courts of the Second Circuit and Southern District. See e.g. *United States v. Wolfson*, *supra*, 558 F.2d at 60-64; *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Wolfson v. Palmieri*, 394 F.2d 7 (2d Cir. 1968). In affirming Judge Palmieri's denial of the first *coram nobis* petition, the Second Circuit, which had supported Judge Palmieri in his refusals to recuse himself,

II. Discussion

With the foregoing as background, this court now examines the claims before it. Wolfson argues that he has discovered new facts through recently obtained evidence heretofore unavailable to him, which would have resulted in his acquittal had the facts been known during the Continental trial.

The "critical" newly discovered evidence is as follows: (1) S.E.C. documents and files relating to the Capital and Merritt investigations; (2) the memorandum prepared by Kidder at the time of the Capital investigation; (3) the deposition of Anthony Englese, who represented Morley at his appearance before the S.E.C. in 1965; and (4) the transcript of Glickstein's testimony before the grand jury.

---

suggested that if there were any further proceedings in the Wolfson case that Judge Palmieri should consider voluntarily recusing himself. *United States v. Wolfson, supra,* 558 F.2d at 64, n. 17.

Judge Palmieri responded at length to the Second Circuit's suggestion in his opinion in *In re Wolfson,* No. M 23-7/77 (S.D.N.Y. June 15, 1978). Setting forth his reasons for denying the motion for recusal which was again then before him, Judge Palmieri stated:

> Petitioner's exhaustive post-conviction efforts have caused a considerable expenditure of judicial resources, to say nothing of the time and expense inflicted upon the United States Attorney and related agencies. He has left in his wake massive and complex records which would impose a heavy burden on any judge of this court assigned to the case. All of the Assistant United States Attorneys familiar with these proceedings have resigned and the Court understands that this is largely true with respect to the personnel of the Securities and Exchange Commission. The efficient administration of justice would have been frustrated by a decision to disqualify.

Id. at 8. Nevertheless, Judge Palmieri went on to state:

> [A]fter ruling on the motions presently *sub judice* and filing this opinion, this Court will address the Assignment Committee...and

Petitioner states that the S.E.C. files revealed that Kidder and Morley were subjects of the 1950 investigation, and even more relevant, that he was not. Therefore, access to the files, according to Wolfson, would have enabled him to refute the prosecutor's improper innuendos linking him to the 1950 Capital investigation which misled the jury into believing that petitioner had been guilty of the same Section 5 violations in 1950. Petitioner alleges that the Kidder memorandum reveals that Kidder had been the subject of investigation by the S.E.C. in 1950, and that in addition, it is evidence of Morley's knowledge and subsequent blatant disregard of the Securities Act's requirements. The Englese deposition demonstrated that Englese misled the S.E.C. when he accompanied Morley in 1965 into believing that he was Morley's counsel rather than in-house counsel for Reynolds. Englese' deposition also revealed that he had accom-

---

request that any further responsibility for these proceedings be assigned to another judge of this Court.

Id. at 10.

The instant petition was then assigned to this court. Although viewing the claims before it dispassionately, this court cannot fail to be aware of the history of the case, if only because the court has been required to locate, assemble, and review extensive records in order to analyze the repetitive claims that have been presented. Were this a habeas petition, the court would have recourse to a provision in 28 U.S.C. §2254 (and 28 U.S.C. §2255), which reads:

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rules Governing §2254 Cases, Rule 9. The court is not aware of an analogous provision in 28 U.S.C. §1651 authorizing the dismissal of a petition which the court considers to be an abuse of the writ of error coram nobis. For this reason, and also in order to present as full a record as possible, the court has considered every issue raised by petitioner.

panied Morley to the office of the Assistant United States Attorney who prosecuted the Continental case. From these facts, petitioner argues that the government and Reynolds entered into a deal trading Morley's testimony for Reynolds' immunity from prosecution for its own Securities Act violations. And finally, petitioner states that Glickstein's grand jury transcript supports the previously raised claim of ineffective assistance of counsel. In sum, petitioner asserts, citing *Brady v. Maryland*, 373 U.S. 83 (1963), that his Fifth Amendment due process rights were violated as a result of the prosecutor's "fraudulent representations to the trial court [which] deceived Judge Palmieri into excising critical pages of the testimony before the S.E.C. in 1965 by John Morley, a key prosecution witness." In addition to this Fifth Amendment claim, petitioner asserts a Sixth Amendment violation as a result of Glickstein's grand jury appearance. These claims will be considered *in seriatim* after a review of the applicable standards for reviewing a petition for a writ of error *coram nobis*.

A writ of error *coram nobis* is an extraordinary remedy that is invoked to vacate a judgment of conviction only where there has been a fundamental error of fact rendering the proceedings irregular and invalid. *United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Mayer*, 235 U.S. 55 (1914); *United States v. Keogh*, 417 F.2d 885 (2d Cir. 1969); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968). The purpose of the writ is "to bring to the attention of the court some fact unknown to the court, which if known would have resulted in a different judgment." *Allen v. United States*, 162 F.2d 193, 194 (6th Cir. 1974). The factual matters to be reviewed must be of the utmost gravity. *United States v. Malinsky*, 310 F. Supp. 523 (S.D.N.Y. 1970). Equally well settled is the principle that the petitioner is entitled to an evidentiary hearing only if he raises a

material issue of fact on a claim of constitutional dimensions. *United States v. Carlino*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013; *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961).

This court must also be mindful of proscriptions against repetitive litigation. Issues that have been adjudicated upon trial or appeal may not be raised in a collateral attack. See *Murgia v. United States*, 448 F.2d 1275, 1276 (9th Cir. 1971); *Stein v. United States*, 390 F.2d 625 (9th Cir. 1968). "It is hornbook law by now that a Section 2255 motion [the modern equivalent to *coram nobis*] may not be used to relitigate matters not only decided, but which could have been presented, on direct appeal, nor may the section be applied in a collateral attack based upon a fragmentized claim which petitioner raised in a slightly different fashion at his trial and upon appeal." *Williams v. United States*, 334 F. Supp. 669, 671 (S.D.N.Y. 1971), aff'd, 463 F.2d 1183 (2d Cir. 1972), *cert. denied*, 409 U.S. 967 (1972) (citations omitted). See *Polizzi v. United States*, 550 F.2d 1133 (9th Cir. 1976).

A. Fifth Amendment Brady Claim

Petitioner argues that the government violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963) by deliberately suppressing portions of Morley's S.E.C. testimony. That testimony, petitioner contends, in conjunction with the Kidder memorandum, would have enabled the defense to convince the jury that Morley had willfully violated the Securities Act, thus placing the credibility of the government's key witness in question. The result, according to petitioner, would have been a reasonable doubt of petitioner's guilt in the jury's mind sufficient to obtain an acquittal. Although petitioner asserts that the excised pages led to the suppression of other relevant and exculpatory material, such as the Kidder memorandum and the S.E.C. investigative file, the

claim, stripped to its bare essentials, is simply one of violation of 18 U.S.C. §3500.[5] As such, this court is barred from addressing the merits of this claim on several grounds. First, the trial court, at defense counsel's request, examined the excised portions *in camera* and preserved the transcript for review by the Court of Appeals, in accordance with 18 U.S.C. §3500(c). However, petitioner failed to raise the propriety of the court's ruling on appeal. Furthermore, petitioner's claim that Morley's suppressed testimony would

---

[5] In *Brady v. Maryland*, 373 U.S. 83 (1973), the court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968), the Second Circuit applied the rule to a *coram nobis* petition. The court first reviewed guidelines for a habeas attack on a conviction when the defense has discovered after trial that a prosecutor withheld exculpatory material from a defendant at trial. The court distinguished three categories of cases and the requisite showing of materiality required by petitioner in each category to entitle him to post-conviction relief: (1) when the prosecutor deliberately withholds evidence which he knows would be of great value to the defendant, the evidence is, by definition, of such great importance that there is no question that the defendant was prejudiced, *id.* at 146-47; (2) when the prosecutor suppresses evidence favorable to the accused after his request, the evidence must be material to guilt or punishment regardless of the good or bad faith of the prosecutor, *id*, at 147, *citing Brady v. Maryland*, *supra*; and (3) when the prosecutor inadvertently suppresses material which it later appears the defendant could have used, there must be a high showing of materiality, *United States v. Keogh*, *supra*, 391 F.2d 147. The court held that a *coram nobis* petition required a high showing of materiality to entitle the petitioner to post-conviction relief, *id.* at 147, and further stated."it is only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror that justice compels the invalidation of the conviction." *id.* at 148. See also, *United States v. Keogh*, 440 F.2d 737, 741 (2d Cir. 1971). As the ensuing discussion reveals, this court does not find that the allegedly withheld evidence would have been of any benefit to petitioner at trial, much less that it would have raised a reasonable doubt as to his guilt.

have enabled him to impeach Morley's credibility was asserted in his first petition for a writ of error *coram nobis*. Judge Palmieri rejected the claim because petitioner had an opportunity to remedy any error on appeal from his conviction. Notwithstanding this deficiency, the trial court considered the merits of the claim. Labeling "petitioner's excursion into the area of the 3500 material...a hollow issue," *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976) at 28, Judge Palmieri continued:

> The main thrust of this claim, as petitioner admits, relates to the "relative 'guilt' of Wolfson, the defendant, versus Morley, the prosecution witness." This is a contention that was unsuccessfully presented at trial. Petitioner appears unable or unwilling to grasp the fact that Morley's knowledge cannot exculpate the petitioner. The evidence and testimony objected to was presented to demonstrate that petitioner was aware of the registration requirements. Evidence that shows Morley to have had the same awareness proves nothing.

Id. at 29. Petitioner did not pursue this claim on appeal from the denial of the petition. *See* 558 F.2d at 64, n. 18. Despite the fact that the claim of improper redaction of 3500 material was not raised at the appropriate time, it was nonetheless considered and rejected on the merits by Judge Palmieri. Under any standard of *coram nobis* review, this court may not consider it again. *Williams v. United States*, *supra*, 334 F. Supp. at 671.

Petitioner would fare no better if this court were to consider the merits of the claims relative to the allegedly suppressed material. The Kidder memorandum is a six page review of the Securities Act requirements, prepared by Kidder in 1950, in conjunction with the S.E.C., for distribution to its personnel involved in the sale of securities. This court cannot conceive of any possible theory under which

petitioner's possession of that document at trial would have caused a different result. Petitioner argues that the memorandum would have been evidence that Morley knew of and later defied the Securities Act requirements, and also that the S.E.C. had investigated Kidder. Morley's knowledge is not contradictory to his position at trial; in fact he testified that he conveyed this knowledge to petitioner. And, too, Morley admitted before the S.E.C., which admissions were included in the redacted version of his testimony in court, that he had violated the Act and had been censured by his firm. Furthermore even if Morley and Kidder *had* violated the Securities Act in 1950, that fact could not have so discredited Morley in 1967 so as to have affected the outcome of the trial. And finally, Morley's credibility had been attacked at trial by the demonstration of inconsistencies between his S.E.C. and trial testimony. This renewed attack on Morley's credibility, raised through this "newly discovered evidence", entitles petitioner neither to an evidentiary hearing, *see United States v. Tribote*, 297 F.2d 598, 600 (2d Cir. 1961) nor to a writ of error *coram nobis* vacating his conviction. *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968).

Petitioner also asserts that the previously withheld S.E.C. files of the Capital investigation, which contained the Kidder and Kelly memorandum are important "newly discovered evidence" because they allegedly support the claim that the prosecutor deliberately misled the jury during the summation. A similar argument was raised and rejected in the first *coram nobis* petition on the ground that even at that point in the proceedings it had been previously considered. See petition for a Writ of Error *Coram Nobis*, May 16, 1975 at 34-35; *United States v. Wolfson*, No. 66 Cr. 720 (S.D.N.Y. July 26, 1976) at 31. Nothing in the files adds weight to the argument, which is revealed on close examination to be not only

implausible but disingenuous. Had all the facts surrounding the Capital investigation been known, according to petitioner, the jury would have believed him when he said he didn't remember anything about the meeting with Kelly. After all, why would he be expected to remember a meeting of so little consequence to him. The argument is flawed because, in the first instance, the prosecutor's statement did not create the "totally false impression" that Wolfson was the target of an investigation in 1950. The challenged portion of the summation reads:

> [T]here is an additional significance to this document [Exhibit 21], and that is that Mr. Wolfson did take the stand,...and he sat there and he tried – he had the nerve to try to put over on this jury the idea that he was as innocent today as he pretended to be on (October 12, 1950).[6]

(Trial transcript at 2453). According to the Kelly memorandum, Wolfson told Kelly at the meeting that he knew nothing about the Securities Act and the registration requirements. The prosecutor's statement fairly describes Wolfson's professed lack of knowledge. And although not named as a target of the investigation, the S.E.C. files describe the nature of Wolfson's interest in the company being investigated. The jury would have expected Wolfson to remember a two hour meeting with an S.E.C. official that was precipitated by an investigation into the company which he controlled. This court concludes that nothing in the S.E.C. files would have changed the jury's assessment of Wolfson's credibility with respect to the Kelly meeting, nor his culpability in the Continental case.

---

[6] The transcript erroneously states August 12, 1950; however, the meeting was on October 12.

Petitioner claims that the Englese deposition is probative of the deal between Morley, Reynolds and the government. However, petitioner does not support this accusation by specific reference to any statements of Englese, nor is this court able to discern the existence of such a deal by its reading of the deposition testimony. The court concludes that the allegations are pure speculation, and as such cannot entitle petitioner to any relief. *Accardi v. United States*, 379 F.2d 312, 313 (2d Cir. 1967); *United States v. Tribote, supra*, 297 F.2d at 601.

B. Sixth Amendment Ineffective Assistance of Counsel Claim

a. Glickstein

In reviewing the denial of the first *coram nobis* petition, the Second Circuit carefully considered and rejected petitioner's claim that Glickstein's grand jury appearance denied Wolfson his Sixth Amendment rights. The court noted that "Wolfson's counsel claimed to have 'invoked the attorney-client privilege where appropriate,' and there is nothing to indicate that this is not so." *United States v. Wolfson, supra*, 558 F.2d at 66. The court held that the claim "had insufficient factual support of likelihood of ultimate success." *Id.* Upon petitioner's 1977 post-trial motion, Judge Palmieri reviewed the transcript and concluded that there had been no violation of the attorney-cient privilege but, nevertheless, granted petitioner's motion. On the basis of having seen the transcript, petitioner now renews this claim. This court has also reviewed the transcript, and agrees with Judge Palmieri that it reveals that Glickstein conscientiously and carefully protected any privileged information from disclosure. The court therefore finds that the claim is baseless.

b. Gould

Petitioner again raises the spectre of a secret deal between the S.E.C. and Gould to overturn a twelve year old conviction. The claim has been previously considered and rejected; in the first coram nobis petition and on appeal from that decision. It is therefore inappropriate for this court's review. The merit of the claim is further diminished by Gould's sworn statement of April 10, 1978, in which he asserts that he has no knowledge that he was ever a target of an S.E.C. investigation in the matter alleged or any other matter. (Government's exhibit B).

III. Conclusion

Petitioner has again attacked his conviction by attempting to undermine the evidence introduced against him at his trial. He states "[w]hat a difference at the trial if Morley's credibility could have been destroyed and the memo introduced through Duncan refuted!!!" (Petition at 6). Although this court neither heard the testimony nor viewed the exhibits as they were introduced, it has reviewed substantial portions of the trial record as they relate to the issues before it. The court need not speculate as to whether either of the conditions hypothesized by petitioner would have indeed led to a different result because the court cannot agree with petitioner that he has uncoverd facts which would have led unalterably to the destruction of Morley's credibility or to the discrediting of the S.E.C. memorandum. Accordingly, the petition is denied.

So Ordered.

Lee P. Gagliardi

U. S. D. J.

Dated: New York, N.Y.
February 20, 1980